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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 672

THE BALIAN ICE CREAM CO. INC., a corporation, F. AND A. ICE CREAM CO., a corporation, COLONIAL ICE CREAM CO., INC., a corporation, *et al.*,

Petitioners,

vs.

ARDEN FARMS CO., a corporation, *et al.*,

Respondents.

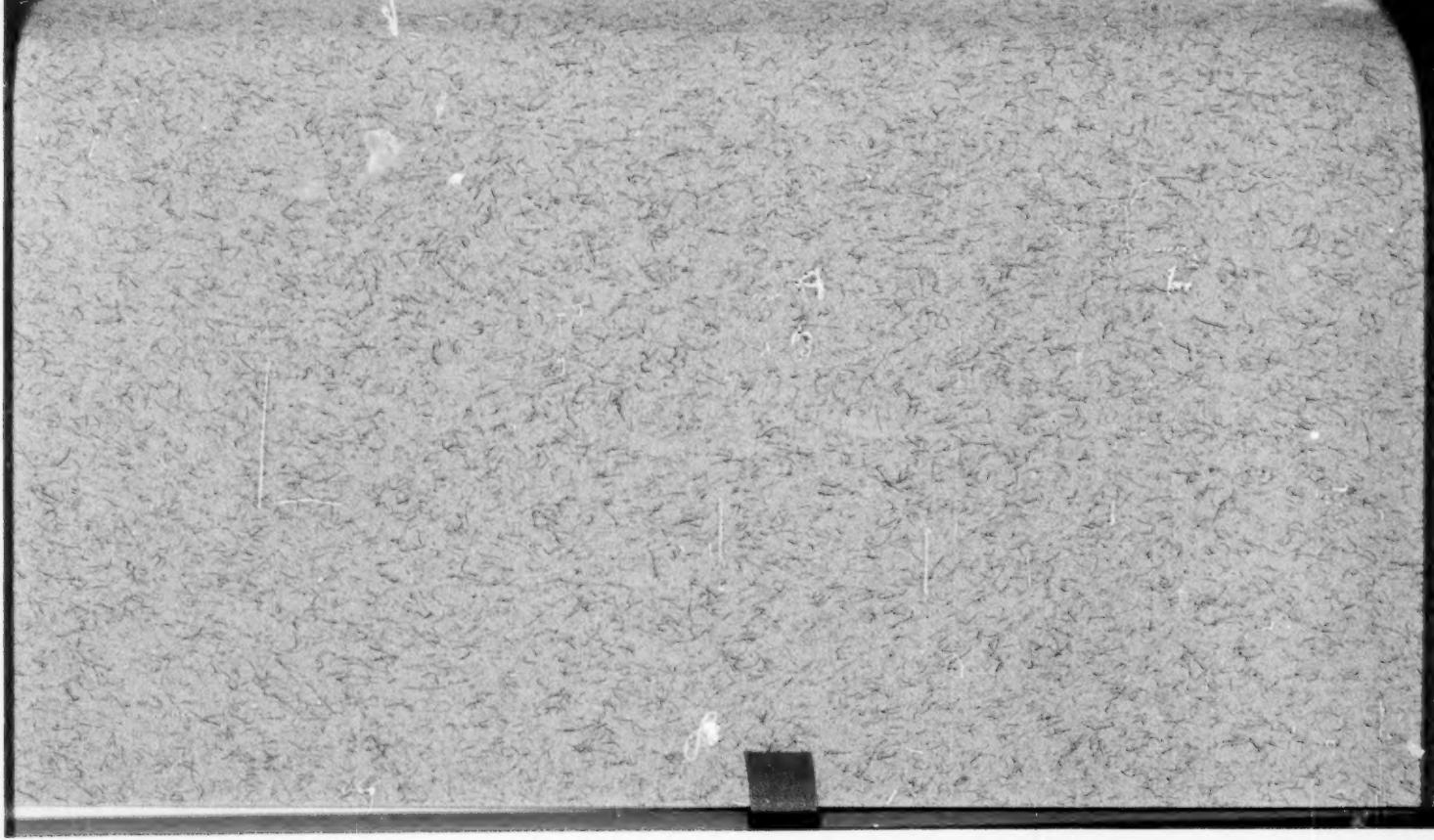
Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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(Appendices hereto are under separate cover.)

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ARDEN FARMS CO., a corporation, *et al.*,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, The Balian Ice Cream Co., Inc., and fourteen other separate petitioners pray that a writ of certiorari issue to review the final judgments of the Court of Appeals for the Ninth Circuit in these fifteen causes brought under the antitrust laws to redress geographical price discrimination. This single petition is presented since identical questions arise in all the cases. (Rule 23[5].)[1]

[1]The Petitioners, in addition to Balian, are F. and A. Ice Cream Co., Colonial Ice Cream Co., Minick's Ice Cream Co., Inc., Paramount Ice Cream Corp., H. L. Beckley, *et al.*, Howard B. Lawrence, etc., H. B. Henry, etc., James Coykendall, etc., David Bresler, etc., W. I. Ridgway, etc., Walter M. Temple, etc., Ivan P. Wheaton, etc., Martin H. Brand, etc., and Eugene L. Collier, etc. [R. 335-337.] There was a single transcript of record below.

Opinion Below.

The opinion of the Court of Appeals [R. 2080-2101] printed in Appendix A hereto,[2] pages 1-24, is not yet reported. The opinion of the District Court [R. 115-144] is reported at 104 F. Supp. 796.

Jurisdiction.

The judgments of the Court of Appeals were entered on October 31, 1955 [R. 2103-2116] and are printed in Appendix B hereto, pages 25-32. A timely petition for rehearing was filed on November 30, 1955 [R. 2117], and was denied by order dated December 27, 1955 [R. 2117], printed in Appendix C hereto, page 33. The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1254(1).

Questions Presented.

1. In a case of geographical price discrimination growing out of a blanket local price cut by a corporation which thereafter continued to maintain its higher prices in interstate commerce, is it not in derogation of federal statute for a court to rule that, because the injury is locally sustained, local sellers competing with the discriminator have no claim for relief against such discriminator? (Sec. 2[a] of the Clayton Act as amended by the Robinson-Patman Act, 38 Stat. 730, 49 Stat. 1526, 15 U. S. C., Sec. 13[a].)

2. In such a case, where the high-price leg of the discrimination was in interstate commerce and the low-price

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[2]References herein to Appendices A-D are to the appendices hereto which are printed under separate cover. References to Appendices I-XXXVI are to "Appendices to Appellants' Opening Brief" in the Ninth Circuit, filed here as a supplemental transcript of record.

leg was local, is it not in derogation of federal statute for a court to impose the requirement that the price differentials maintained by the discriminator are illegal only if they concern sales by the discriminator to purchasers who compete directly with each other?

3. In such a case, is it not in derogation of federal statute for a court to permit the discriminator to excuse its area-wide, local price cut from illegality under Section 2(a) of the Act on the ground under Section 2(b) thereof that such discriminations were made "in good faith to meet an equally low price of a competitor," when the discriminator blanketed an entire local area with a price cut on certain products and did not limit its claimed meeting of a competitor's equally low price to the individual, particular instances in which such lower prices arose? (Sec. 2[b] of the Clayton Act as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C., Sec. 13[b].)

4. In such a case, is it not in derogation of federal statute for a court to permit the discriminator to excuse its price discrimination from illegality when the discriminator undercut the prices of local competitors and failed to show the quality of products it claimed to meet or the quantity of sales of such products?

Statute Involved.

The statutory provisions involved are Sections 2(a) and 2(b) of the Clayton Act, as amended by the Robinson-Patman Act, 38 Stat. 730, 49 Stat. 1526, 15 U. S. C., Secs. 13(a)-13(b), which in part provide as follows:

> "(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and

quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them; *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered:

* * * * * * * *

"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

Statement.

On Saturday, November 19, 1949, effective Monday, November 21, respondent Arden Farms Co. suddenly cut the wholesale price of ice cream in the Los Angeles area. Arden's vice-president, Tongue, stated that Arden issued new price lists "and mailed them out Friday night. Some of them landed in the laps of . . . other people's customers Saturday morning." [R. 1617.] Despite its price cut in the Los Angeles area, Arden maintained its higher prices for ice cream in other states and for ice cream shipped and sold in interstate commerce. [R. 558-574; Exs. 13, 50, 51, 52, Appx. XXIV, XXX-XXXII.] In the Los Angeles area Arden cut the base price on its "Flavor Fresh" bulk ice cream from $1.44 to $1.06 per gallon, and went as low as 90 cents on volume. On "Flavor Fresh" package ice cream Arden cut from a base of $1.72 to $1.32. Corresponding cuts were made by Arden on its cheaper brands, and on ice milk and sherbet. [Exs. 11A, 11G, Appx. XXII, XXIII.] Arden continued these price cuts in effect for a period of time extending from November 21, 1949, to October 18, 1950—nearly eleven months. [Ex. 11G, Appx. XXIII; Ex. 12.]

Each petitioner invoked the jurisdiction of the District Court by filing a complaint asserting that respondents, Arden and its subsidiaries, by local price cutting, had engaged in geographical price discriminations in violation of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, 38 Stat. 730, 49 Stat. 1526, 15 U. S. C., Sec. 13. [R. 3, 189, 200.]

All of the essential facts are uncontroverted and indisputable since they appear in the form of documents and admissions of respondents' officers under oath.

The fifteen petitioners are independent ice cream manufacturers and distributors in the area of Los Angeles, California. Eight are individual proprietors, five are corporations, and two are partnerships. [Ex. 1.] The businesses of petitioners are comparatively small and are confined to the Los Angeles area where each petitioner on the average does less than one-twentieth of the volume of business done by respondents. [R. 160, 176.] The businesses of petitioners are not diversified, being limited to ice cream with minor exception. [R. 176, 823, 848.]

Respondent Arden Farms Co. is a Delaware corporation which, through "a series of acquisitions," has become "the largest Dairy Products firm in the entire West." Arden distributes its products at wholesale in California, Arizona, Oregon, Washington, Idaho and Montana. [Ex. 3; R. 50, 97, 98, 350-356.] Every year between these states Arden ships and sells a substantial volume of ice cream, running to hundreds of thousands of gallons selling for an aggregate price amounting to hundreds of thousands of dollars. [R. 554-557, 562, 563-575, 731-752, 1388.] Accordingly, the District Court found that "Arden, in the manufacture, distribution, and sale of ice cream products, was engaged in commerce among the several states." [R. 176; Fdg. 43.] Arden's business and interests are diversified into milk, various foods, grocery chains, finance, and dairy industry supplies. [R. 351, 428-441.]

Although Arden's ice cream costs in Los Angeles were higher than elsewhere, it imposed lower prices for identical products in Los Angeles than in other places. [R. 706-707, 1443, 1459, 1462.] During the price war Arden's ice cream sales in other states, involving interstate commerce, were "profitable." [R. 1495.] Also, during the

price war in the Los Angeles area, Arden's wholly-owned subsidiary raised prices in Arizona. [Ex. 13, Appx. XXIV.]

Petitioners felt the impact of Arden's price cut in two different ways. Some of them attempted to maintain their volume by cutting prices in line with Arden's prices. [R. 1131.] Others did not cut prices on certain items or did not cut prices sufficiently to hold their volume. [R. 1131.] Petitioners sustained extensive losses of revenue as compared with their operations at their price scales existing immediately before Arden's price cut. [R. 1131-1139, 1153-1166, 1173.] However, the District Court refused to make any findings, one way or the other, concerning the injurious effects of Arden's price cut upon petitioners. [R. 170; Fdg. 31.]

In the summer of 1950, several of the petitioners made efforts to restore their former prices. Arden rendered these efforts ineffectual by sending out, as its president stated in the minutes of Arden's operating committee, "a broadside to all ice cream dealers." The "broadside" appeared in the form of a circular, which Arden sent to the ice cream trade in Los Angeles, stating, "Arden Holds the Line!! . . . Arden Helps You Keep Prices Low." [Ex. 5, Appx. X; Ex. 9, Appx. XIV.]

On October 11, 1950, one of the petitioners filed the first action herein to enforce the antitrust laws. [R. 200.] One week later, on October 18, 1950, Arden raised its prices in the Los Angeles area. [Ex. 12.] This signaled the end of the price war.

Respondents defended upon three bases: (1) That Section 2(a) of the amended Clayton Act does not prohibit such geographical price discrimination; (2) That an intent or purpose to harm competitors is requisite to a vio-

lation of Section 2(a) of the Act; and (3) That respondents could blanket an entire local area with price cuts and still claim the affirmative defense of acting ". . . in good faith to meet an equally low price of a competitor . . ." under Section 2(b) of the Act. (49 Stat. 1526, 15 U. S. C., Sec. 13[b].) Without equivocation the District Court followed this reasoning.

The District Court actually (1) said, on the question of geographical price discrimination, "I will say again there is nothing in the law . . . which prohibits from selling the same product at different prices in different places" [R. 603]; (2) said, on the question of intent or purpose, "So the cutting of a price means nothing. A man has a right to do that. It is only if he does it with the purpose of freezing out his competitor or if he reduces his price as a means of hurting others does it become illegal at all"[3] [R. 1797-1798]; (3) and said, on the question of the affirmative defense, that there is no ". . . law that sustains that idea you can't underbid your competitor to get his business" [R. 528-529] and further said that respondent Arden was not ". . . limited in its attempt to meet competition to reductions only in the narrow field established . . ." by competitors and that Arden legally could blanket an entire local area with a price cut in order to "meet" the "prices which its competitors had given to special customers only . . ." [R. 130-131, 136.]

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[3]The District Court found no such intent or purpose. [R. 170, Fdg. 31.] It is to be noted, however, that Section 2 of the Clayton Act, as amended, contains no requirement of intent or purpose. Such provision was stricken out of the original House Bill by the Senate in 1914. (Sen. Doc. 584, 63d Cong., 2d Sess. [1914] 4; Appx. IX.) The documentary record reflecting the policy of Arden Farms Co. on local price cutting as stated by its president is summarized in Appendix D hereto, page 35.

Respondents' claim of the affirmative defense under Section 2(b) of the Act was thus adopted by the District Court despite the fact that, out of approximately 7,000 wholesale ice cream accounts in the entire Los Angeles area,[4] Arden could only claim to be meeting competitors with respect to one and one-tenth per cent (1.1%) of the customers in the area. [Appx. XXXVI.] But even in these few instances, Arden failed to offer evidence of the quality (*e.g.*, the percentage of air, *i.e.*, "overrun") of the ice cream products Arden claimed to be meeting in price, although quality materially affects prices. [R. 1730.] Furthermore, Arden did not submit evidence as to the quantity of sales by competitors, although quantity of purchases materially affects prices. [R. 603.]

Judgments in the District Court were rendered for Arden and the other respondents [R. 145-184], and the Court of Appeals for the Ninth Circuit affirmed. [R. 2080-2101; Appx. A, pp. 1-24.]

Reasons for Granting the Writ.

1. This cause involves questions of major public importance under Sections 2(a) and 2(b) of the Clayton Act as amended by the Robinson-Patman Act. (38 Stat. 730, 49 Stat. 1526, 15 U. S. C., Secs. 13[a], 13[b].) The anachronistic decision of the Court of Appeals for the Ninth Circuit sweeps away essential parts of this important antitrust statute which Congress enacted specifically to outlaw geographical price discriminations. The decision below effectively places such destructive trade

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[4]The approximation of 7,000 accounts is conservative since Arden had 1,400 accounts of larger than average size in the Los Angeles area and these constituted approximately 20 per cent of all business in the area. [R. 1571, 1588; Ex. AS.]

practices beyond remedy by engrafting false, non-statutory restrictions upon the Act. The Ninth Circuit accomplishes this result by deciding important questions of federal law squarely in conflict with applicable decisions of this Court and in conflict with decisions of the Court of Appeals for the Second Circuit. Manifestly, the Ninth Circuit's opinion looms as a serious hindrance to the future administration of the antitrust laws.

The basic and original purpose of Congress in enacting Section 2 of the Clayton Act was to outlaw local price cutting by interstate concerns in "a particular state." (H. R. Rep. No. 627, 63d Cong., 2d Sess. [1914] 7, 9; Appx. VII.) Yet, despite the fact that respondent Arden was "engaged in commerce among the several states" [R. 176, Fdg. 43], and maintained its higher prices in interstate commerce while cutting prices locally, the Court of Appeals concludes that it "[would be unwise to prevent cutting] the prices for the benefit of the public in that area [Los Angeles] . . . would not be in the public interest . . . [and] would ring the death knell of competition." [R. 2096; Appx. A, pp. 18-19.]

Thus the Ninth Circuit clearly substitutes its own policy which would permit geographical price discrimination for that declared by Congress in a statute designed to preserve competition by outlawing such discrimination. In practical application, the decision of the Court of Appeals unwarrantedly removes this form of price discrimination from attack either by the Federal Trade Commission or by an injured seller competing with the discriminator.

An authoritative determination by this Court is necessary to insure the continued application of this antitrust statute to geographical price discrimination—the specific evil which Congress sought to eliminate.

2. The decision of the Court of Appeals is in direct conflict with the decision of this Court in *Moore v. Mead's Fine Bread Co.*, 348 U. S. 115, 75 S. Ct. 148, 99 L. Ed. 145 (1954).

There, this Court considered Section 2(a) of the Clayton Act (amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. §13[a]) as outlawing geographical price discriminations precisely similar to those in the case at bar. In the *Mead* case, this Court definitively stated:

> "Respondent is engaged in commerce, selling bread both locally and interstate. In the course of such business, it made price discriminations, maintaining the price in the *interstate* transactions and cutting the price in the *intrastate* sales." (348 U. S. at 118.)

The Ninth Circuit refused to recognize the illegality of geographical price discrimination.

Even though respondent Arden was "engaged in commerce among the several states" [R. 176, Fdg. 43] and maintained its prices in interstate transactions while cutting the price of its intrastate sales, the decision of the Court of Appeals refuses to recognize the illegality of such geographical price discrimination. In extreme error, the decision of the Ninth Circuit states:

> "It is obvious that Arden, by selling ice cream products in the Los Angeles area at a lower price than it charged for like products in other states, did not violate §2(a) of the Clayton Act, as amended, 15 U. S. C. A. §13(a)." [R. 2096; Appx. A, p. 18.]

This is grave divergence from statute. The opinion of the Court of Appeals would turn the law back to pre-Clayton status.

Indeed, the Ninth Circuit goes so far as to align itself with the erroneous efforts of another far-western circuit —the Tenth—which this Court reviewed in the *Mead* case. This strange, almost word-for-word alignment with the rejected views of the Tenth Circuit appears in connection with the second and third extreme errors noted here.

The Ninth Circuit refused to recognize locally sustained injuries as protected by statute.

In its next extreme divergence the Court of Appeals ruled that, because only local sellers, victimized by the discriminator's low price, sustain injury, Section 2(a) of the amended Clayton Act does not apply despite the fact that discriminator maintains a high-price differential as to interstate sales. Following in the footsteps of the Tenth Circuit (see, *Mead's Fine Bread Co. v. Moore,* 208 F. 2d 777, 780 [10th Cir., 1953]) the Ninth Circuit in the case at bar states:

> "There was absolutely no evidence in the record that the differentials as to sales in commerce or in other areas had any relation to any injury or damage which the plaintiffs may have sustained. . . . Any revenue loss to plaintiffs as a result of the lowering of prices is merely one of the results of *local* competition." [R. 2097; Appx. A, pp. 19-20; italics added.]

It is obvious that the Ninth Circuit, proceeding under misconception, has unduly restricted federal antitrust power under the Commerce Clause. This misconception, first embraced by the Tenth Circuit and now by the Ninth, is "at war" with the decision in *Moore v. Mead's Fine Bread Co.,* 348 U. S. 115, 119-120, 75 S. Ct. 148, 99

L. Ed. 145, 149-150 (1954), where this Court specifically stated:

> "The victim, to be sure, is only a local merchant . . . But . . . the prices on interstate sales . . . are kept high while the local prices are lowered . . . No instrumentality of interstate commerce would be used to destroy the local merchant . . . But the opportunities afforded by interstate commerce would be employed to injure local trade. Congress, as Guardian of the Commerce Clause, certainly has power to say that those advantages shall not attach to the privilege of doing an interstate business."

The Ninth Circuit imposed upon the statute the false requirement that purchasers from the discriminator must compete with each other.

In further extreme error the Court of Appeals ruled that in a geographical price discrimination case there is no violation of Section 2(a) of the amended Clayton Act unless there are sales at different prices to purchasers who compete directly with each other. This dangerous misconception requiring competition between purchasers in a geographical price discrimination case has carried over from the Tenth Circuit (see, *Mead's Fine Bread Co. v. Moore*, 208 F. 2d 777, 780) into the Ninth Circuit. Again falling into the same pitfall as the Tenth Circuit, the Ninth Circuit states:

> "The customers of Arden in the respective areas are not in competition with each other. . . .
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> * * * * * * * *
>
> "It must be noted that there was *not* here involved a differentiation between purchasers from Arden of goods shipped in interstate commerce *where the pur-*

chasers were in competition among themselves." [R. 2097, 2098; Appx. A, pp. 19, 21; italics added.]

It is, of course, elementary in geographical price discrimination cases that competition between purchasers is *not* required. In such cases it is competition between sellers—Arden and the petitioners—that is being protected by the statute. The legislative history of Section 2 of the Clayton Act conclusively establishes this fact. (H. R. Rep. No. 627, 63d Cong., 2d. Sess. (1914), 7, 9; Appx. VII.)

In *Moore v. Mead's Fine Bread Co.,* 348 U. S. 115, 75 S. Ct. 148, 99 L. Ed. 145 (1954), there were no sales by the discriminator to competing purchasers. Obviously, the wholesale purchasers of bread at the point of the price cut—restaurants and grocery stores in Santa Rosa, New Mexico—do not in any way compete with restaurants and grocery stores in distant Farwell, Texas.

In *Porto Rican American Tobacco Co. v. American Tobacco Co.,* 30 F. 2d 234 (2d Cir., 1929), non-competing purchasers—"those of the United States and of Porto Rico"—were involved. In that case the Second Circuit recognized that the statute protects a seller competing with the discriminator even though the purchasers from the discriminator reside in various geographical areas. Yet, the Ninth Circuit is opposed. The decision of the Ninth Circuit, therefore, is in conflict in principle with that of the Second Circuit in the *Porto Rican* case, as well as with this Court's decision in the *Mead* case.

Federal power under the Commerce Clause would be severely restricted by the foregoing extreme errors of the Court of Appeals' holding: (1) that local price cutting by interstate concerns, such as that in the case

at bar, is not outlawed by the statute; (2) that, in any event, because the injury sustained is local, the Act does not apply despite the maintenance by the discriminator of a high-price differential in interstate sales; (3) and that price differentials can never be illegal unless they exist with respect to competing purchasers.

In derogation of this Court's decision in the *Mead* case the Ninth Circuit goes a long way toward making this important antitrust statute a dead letter in the field of geographical price discrimination. The persistence of these major misconceptions of federal antitrust law calls for review by this Court. These issues should be set at rest once and for all.

3. The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The Ninth Circuit based its decision in part upon a non-existent finding as to the likelihood of competitive injury. This is a most unusual departure from the accepted course of appellate proceedings. The Court of Appeals states:

> "The difference in price between the various states did not substantially lessen competition . . . *The findings of the trial court expressly negativing . . . a possibility of such results* were supported by substantial evidence." [R. 2099; Appx. A, p. 22; italics added.]

The Court of Appeals thus asserts that the District Court found there was no possibility that competition might have been lessened. In fact the District Court did not make such a finding. Its only finding was that

competition was not actually lessened. [R. 177, Fdg. 45.] The finding actually made is insufficient to preclude relief under the statute as construed by this Court.

Petitioners' reply brief (pp. 29-30), and petition for rehearing (pp. 3-5) as well, specifically advised the Court of Appeals that no finding existed as to the possibility that competition might have been injured.

The non-existent "finding" relates to an important part of the case. As this Court in *Corn Products Ref. Co. v. F. T. C.*, 324 U. S. 726, 738, 742, 65 S. Ct. 961, 89 L. Ed. 1320, 1332, 1334 (1945), said:

> "It is to be observed that §2(a) does not require a finding that the discriminations in price have *in fact* had an adverse effect on competition. The statute is designed to reach such discriminations 'in their incipiency,' before the harm to competition is effected. It is enough that they 'may' have the prescribed effect.
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> * * * * * * * *
>
> *"As we have said, the statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they 'may' have such an effect."* (Italics added.)

The Court reiterated this basic principle in *F. T. C. v. Morton Salt Co.*, 334 U. S. 37, 45-46, 68 S. Ct. 822, 92 L. Ed. 1196, 1203, 1204, 1206 (1948), and there went on to state (1) that the "avowed purpose" of Section 2 of the amended Clayton Act was "to protect competition from all price differentials except those based in full on cost savings . . .", to state (2) that the adverse effect of such price discrimination is "self-evident," and further to state (3) that the statute ". . . was intended to

justify a finding of injury to competition by a showing of injury to the competitor victimized by the discrimination." (Italics added.) Accordingly, the reasonable possibility of injury to competition may exist where there is a showing as to one competitor only. At bar there are fifteen sellers—the petitioners—directly involved in competition with Arden, not to mention others concerned.

Moreover, as demonstrated under the parallel provisions of Section 3 of the Clayton Act (38 Stat. 731, 15 U. S. C. §14), the reasonable possibility that there may be competitive injury is immediately established when it is shown the respondent is a "leader", "though clearly not dominant", in the industry. (*Dictograph Products, Inc. v. F. T. C.*, 217 F. 2d 821, 827 [2d Cir., 1954], cert. den. 349 U. S. 940.) Consequently, where, as in the case at bar, it is shown that the proscribed acts were committed by a leader in the industry, the reasonable possibility of adverse effect upon competition is readily established. It is therefore significant that the non-existent "finding" not only was not made, but that under these controlling decisions could not have been made under the circumstances present here.

Necessarily, the Ninth Circuit's drastic deviation from fundamentals calls for the exercise of this Court's power of supervision.

4. The decision of the Court of Appeals is in direct conflict with the decision of this Court in *F. T. C. v. Staley Mfg. Co.*, 324 U. S. 746, 65 S. Ct. 971, 89 L. Ed. 1338 (1945).

Under Section 2(a) of the amended Clayton Act, the conduct—geographical price discrimination—of respondent Arden is specifically declared to be illegal. As this Court

said in *F. T. C. v. Staley Mfg. Co.*, 324 U. S. 746, 759, 65 S. Ct. 971, 89 L. Ed. 1338, 1347 (1945):

> ". . . the seller [Arden] is aware that his discrimination is *unlawful*, unless good faith is shown, and in circumstances, which are peculiarly favorable to *price discrimination abuses*." (Italics added.)

When Congress amended Section 2 of the Clayton Act in 1936, a prime legislative objective was to "stop up" the "loopholes" in the old Act which had developed under claims of "meeting competition." (80 Cong. Rec. [1936] 3119.) Obviously, violation of the national policy outlawing the destructive practice of price discrimination required congressional attention. (H. R. Rep. 2287, 74th Cong., 2d Sess. [1936] 16.)

Accordingly in Section 2(b) of the amended Act Congress carefully restricted the new exception, or proviso, by prohibiting claims of "meeting competition" except in those individual instances where made ". . . .in good faith to meet an *equally* low price of *a* competitor. . . ." (49 Stat. 1526, 15 U. S. C. §13(b); italics added.)

This Court recognizes that Congress has placed definite restrictions upon the extent to which a price cutting seller may claim that the proviso shields an otherwise illegal act of price discrimination. Therefore, in *F. T. C. v. Staley Mfg. Co.*, 324 U. S. 746, 753, 65 S. Ct. 971, 89 L. Ed. 1338, 1344 (1945), this Court stated:

> "It [the proviso] speaks only of the seller's 'lower' price and of that only to the extent that it is made 'in good faith to meet an equally low price of a competitor.' The Act thus places emphasis on *individual* competitive situations, rather than upon a general system of competition." (Italics added.)

To the same effect:

F. T. C. v. Cement Institute, 333 U. S. 683, 725, 68 S. Ct. 793, 92 L. Ed. 1010, 1047 (1948).

Contrary to the statute, and squarely contrary to this Court's decision in the *Staley* case, the Ninth Circuit refuses to adhere to the rule that a price discriminator's conduct is illegal and may be exempted from Section 2(a) of the statute only in individual instances. [R. 2088, 2100; Appx. A, pp. 9-10, 23.] Thus the Ninth Circuit condones the illegal blanketing of an entire geographical area with a price cut on bulk and package ice cream upon the claim of meeting an insignificant number of claimed lower prices on products which were not known or shown to be equivalent products, *i.e.*, the "prices" were not "equally low" as the statute requires.

This dangerous decision is an open invitation to discriminate upon an area basis. Under the decision of the Ninth Circuit the *exception* contained in Section 2(b) of the amended Clayton Act is now construed to be a broad right rather than a limited exception. Thus the Court of Appeals permits the exception to engulf the entire Act itself. This is contrary to the cardinal and sound rule of statutory construction which requires an exception to a statute to be held within narrow limits. (*Spokane & Inland Empire R. Co. v. United States*, 241 U. S. 344, 350, 36 S. Ct. 668, 60 L. Ed. 1037, 1041 [1916].)

It is manifest that the statute requires respondent Arden to *minimize* its price variations and *confine* them to those *particular instances* where necessary to meet the "equally low price of a competitor." The statute permits the respondent to employ price differentials *only* to this

limited extent. This does not encompass an area-wide price cut.

But these clear rules of statutory law are rendered nugatory by the words of the Ninth Circuit. The Court of Appeals states:

> "The 'blanket price cut' . . . was unquestionably necessary *in the opinion of Arden* to eliminate a great many of the chiselling cuts, special advantages and rebates given by its competitors in this very area." [R. 2095; Appx. A, p. 16; italics added.]

Thus does the decision of the Ninth Circuit permit the discriminator, the major seller in the market, to take the law into its own hands and discriminate on an area basis in defiance of congressional action limiting the claim of meeting a competitor's equally low price to particular, individual instances. (*F. T. C. v. Staley Mfg. Co.*, 324 U. S. 746, 753, 65 S. Ct. 971, 89 L. Ed. 1338, 1344 [1945], *supra.*)

Compelling need for an authoritative decision by this Court on this important question of antitrust law could not be more clearly indicated.

5. The decision of the Court of Appeals is in direct conflict with the decision of this Court in *Standard Oil Co. v. F. T. C.*, 340 U. S. 231, 71 S. Ct. 240, 95 L. Ed. 239 (1951).

Speaking of the statutory exception under Section 2(b) of the amended Clayton Act, with reference to price cutting, in the *Standard Oil* case this Court said:

> "It [Section 2(b)] also excludes reductions which *undercut* the 'lower price' of a competitor." (340 U. S. at 242; italics added.)

It is fundamental that a discriminator cannot claim exemption from illegality when it has undercut a competitor's lower price. But the Ninth Circuit rejects this basic statutory rule and entrenches the discriminator in the position of disciplinarian of the market. The decision of the Court of Appeals states:

> ". . . if Arden had gone beyond the technical limits of meeting an equally low price of a competitor and placed the price lower than any competitor, it would not have been a violation of this statute." [R. 2095-2096; Appx. A, pp. 17-18.]

Obviously, the decision of the Court of Appeals stands in irreconcilable conflict with the decision of this Court in *Standard Oil Co. v. F. T. C., supra.* The Ninth Circuit refuses to be governed by this controlling decision on the subject of undercutting. Moreover, the decision below erroneously states:

> "This finding [meeting the equally low price of a competitor] is not destroyed because it [Arden] failed to introduce evidence of the quality of the product of the competitor. . . ." [R. 2095; Appx. A, p. 17.]

Not only did respondent Arden fail to introduce such evidence, but it was established that Arden put its price down below products of poorer quality. [Exs. AP, 11G, Appx. XXIII; R. 1665.] The Ninth Circuit condones this unlawful practice. [R. 2096; Appx. A, p. 19.]

The harmful result of this decision may be graphically illustrated. Under the ruling of the Court of Appeals, for example, Chrysler is permitted to cut the price of a Chrysler automobile down to the price of a Chevrolet in a given area under claim of meeting a competitor's equally low price. The Ninth Circuit holds that Chrysler is not required to show that Chevrolet is of the same quality. Chrysler, the Ninth Circuit holds, need pay no attention to quality and could cut to Chevrolet's price, *or even lower,* in one geographical area under a so-called claim of meeting a competitor's equally low price while maintaining or even increasing prices of Chrysler automobiles in other states.

That holding is contrary to this Court's decision in *Standard Oil Co. v. F. T. C.,* 340 U. S. 231, 242, 71 S. Ct. 240, 95 L. Ed. 239, 247 (1951), *supra.* It is also in direct conflict with the decision of the Second Circuit in *Porto Rican American Tobacco Co. v. American Tobacco Co.,* 30 F. 2d 234 (2d Cir., 1929), which declared the settled law to be, under the example stated, that even if Chrysler places its car at the *same* price as Chevrolet, and not at a lower price, Chrysler has in fact undercut and *not met* Chevrolet because of the difference in quality.

The decision of the Ninth Circuit thus undermines this antitrust statute by eliminating the clear duty to show quality. Beyond any question, the respondents' failure to show quality meant failure to establish meeting any ". . . *equally* low price of a competitor. . . ." (49 Stat. 1526, 15 U. S. C. §13[b]; italics added.)

The Court of Appeals did not stop with eliminating the quality requirement. It also disregarded the principle enunciated by the Second Circuit respecting quantity. In *F. T. C. v. Standard Brands,* 189 F. 2d 510, 515 (2d Cir., 1951), the court stated:

> "An 'equally low price of a competitor' means an equally low price for a given quantity."

In the ice cream industry involved in the case at bar, through quantity discounts the quantity of sales by competitors materially affects prices. As counsel for the respondents concede, ". . . selling price . . . is wholly meaningless unless it is related to a specific customer as to how many gallons he is using." [R. 603.] Nevertheless, in direct conflict with the Second Circuit's decision in the *Standard Brands* case, the Ninth Circuit states:

> "This finding [meeting the equally low price of a competitor] is not destroyed because it [Arden] failed to introduce evidence of . . . the quantity of sales of the competitor." [R. 2095; Appx. A, p. 17.]

Obviously the Court of Appeals for the Ninth Circuit has proceeded in derogation of Section 2(b) of the amended Clayton Act. It has removed from Section 2(b) the safeguards specifically placed there by Congress to prevent the exception under that section from being used to engulf the basic policy against price discrimination declared in Section 2(a) of the Act.

Conclusion.

Manifestly, the issues here are of widespread public importance. The case at bar involves fundamental questions of antitrust law. The court below has decided those questions in contravention of Sections 2(a) and 2(b) of the amended Clayton Act. Its decision is in direct conflict with decisions of this Court and with decisions of the Court of Appeals for the Second Circuit. It is, therefore, respectfully submitted that this petition for a writ of certiorari should be granted.

February 6, 1956.

GORDON F. HAMPTON,
Counsel for Petitioners.

JAMES C. SHEPPARD, and
RICHARD B. HOEGH,
Of Counsel.

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HAROLD B. WI

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 672

THE BALIAN ICE CREAM CO. INC., a corporation, F. AND A. ICE CREAM CO., a corporation, COLONIAL ICE CREAM CO., INC., a corporation, *et al.*,

Petitioners,

vs.

ARDEN FARMS CO., a corporation, *et al.*,

Respondents.

Appendices to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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(Petition for Writ of Certiorari herein is under separate cover.)

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APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

The Balian Ice Cream Co., Inc., a Corporation, Appellant, vs. Arden Farms Co., a Corporation, *et al.*, Appellees. Nos. 13,758 through 13,592. Oct. 31, 1955.

Upon Appeals from the United States District Court for the Southern District of California, Central Division.

Before: STEPHENS and FEE, Circuit Judges, and LING, District Judge.

JAMES ALGER FEE, Circuit Judge:

Plaintiffs brought fifteen separate actions against defendants under §4 of the Clayton Act, claiming violations of the federal anti-trust laws. The basic claim was that each plaintiff who is an independent ice cream manufacturer or distributor in the Los Angeles area sustained injury when Arden Farms Co., which operates in the manufacture and distribution of dairy products in the same area, lowered its prices upon ice cream in this area alone. Prices on all of its ice cream products were reduced with the exception of prices upon "diced" ice cream manufactured by Arden exclusively and just being introduced on the market. The gist of the complaint was that Arden operated in the northwest states and in Arizona and that discrimination was proved because the price level upon like products in these states was not made to conform to the Los Angeles price level.

Findings of fact of the trial court were extensive.[1] Based thereon, the court held that the statute had not

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[1]"Findings of Fact.

"* * *

"3. In these Findings of Fact and in the Conclusions of Law which follow, unless otherwise noted herein, the terms hereinafter listed shall have the definition and meaning set opposite each:

"Los Angeles Area—All of Los Angeles County and some portions of San Bernardino, Riverside, Ventura, Santa Barbara and Orange Counties, all of said counties being located in the State of California.

"Ice Cream Products—One or more of the following: Ice cream, sherbet, ice milk, ice cream mix and ice milk mix in all forms and grades, and various frozen novelties containing one or more of the following: Ice cream, ice milk, or water ice.

"Milk Products—Milk and certain related products.

"Ice Cream Distributing Subsidiaries—Defendants Frigid Process Company Inc., and Ritz Ice Cream Corp. (subsidiaries of Arden Farms Co., a Delaware corporation) who manufactured, sold or distributed ice cream products at wholesale in the Los Angeles area.

"Diced Cream—A packaged individual serving of ice cream, sherbet, or ice milk of standardized quality which has been packaged by a certain patented machine.

"Jobber or Distributor—A person, firm or corporation in the business of buying ice cream products from manufacturers at wholesale in large quantities and selling same to retailers in smaller quantities.

"4. Plaintiff, The Balian Ice Cream Co., Inc., is a California corporation with its principal place of business in Los Angeles County, California. Said plaintiff is a manufacturer of ice cream products and sells such products at wholesale to route-delivered customers in a portion of the Los Angeles area.

"5. (a) There are two defendants herein having the name Arden Farms Co. One of said defendants is a Delaware corporation (sometimes hereinafter referred to as 'Arden') with its principal place of business in Los Angeles County, California. Arden is engaged among other things in the business of manufacturing ice cream products and selling same at wholesale to route-delivered and jobber customers in the States of California, Washington, Oregon, Idaho and Montana. Arden has four ice cream products manufacturing plants in California; they are located at Los Angeles, San Diego, Fresno and Oakland. Arden, has one ice cream products manufacturing plant in Oregon and two in Washington.

been violated and that no actionable discrimination had been practiced. Judgment for defendants followed. Plaintiffs took these appeals, which are now consolidated.

Arden is also engaged in the business of producing and purchasing milk and from a portion thereof manufactures certain related products. Arden is also engaged in the business of selling milk products at wholesale and at retail in the States of California and Washington.

"(b) The other defendant herein having the name of Arden Farms Co. is an Arizona corporation (sometimes hereinafter referred to as 'Arden of Arizona') with its principal place of business in Phoenix, Arizona. Said defendant is a wholly owned subsidiary of Arden and is engaged in the business of manufacturing ice cream products and selling same at wholesale to route-delivered and jobber customers in the State of Arizona. Said defendants has an ice cream products manufacturing plant in Phoenix, Arizona. * * *

"(c) Defendant Equipment Enterprises, Inc., is a California corporation with its principal place of business in Los Angeles County, California. Said defendant is a wholly owned subsidiary of Arden and does not manufacture, distribute or sell ice cream products, milk products or any other related products.

"(d) Defendant Market Wholesale Grocery Co. is a California corporation with its principal place of business in Los Angeles County, California. Said defendant is engaged in the business of selling groceries and related products at wholesale in the Los Angeles area but it does not manufacture, distribute or sell ice cream products, milk products or any other related products. * * *

"(e) Prior to January 1, 1951, defendant Frigid Process Company, Inc., was a California corporation (sometimes hereinafter referred to as 'Frigid') with its principal place of business in Los Angeles County, California. Said defendant at all times referred to in the complaint herein prior to January 1, 1951, was a wholly owned subsidiary of Arden and had an ice cream products manufacturing plant in Oakland and South Pasadena. Frigid was engaged primarily in the business of manufacturing frozen novelties and selling same at wholesale to other ice cream products manufacturers and to jobbers in Oakland and in the Los Angeles area. On January 1, 1951, the assets of said defendant were sold to third parties. Since said latter date Arden has not owned any stock of said defendant nor has it had any interest in or control of said defendant.

"(f) Prior to January 1, 1950, Ritz Ice Cream Corp. was a California corporation doing business as the Holly-Maid Ice Cream Co. (sometimes hereinafter referred to as 'Holly-Maid') with its principal place of business in Los Angeles County, California. Said

The contentions are: (1) By establishing a blanket price cut on ice cream in the Los Angeles area, defendants had discriminated in price upon a territorial basis

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defendant at all times referred to in the complaint herein prior to January 1, 1950, was a wholly owned subsidiary of Arden. * * * On or about January 1, 1950, said defendant merged with Arden and on or about said date Ritz Ice Cream Corp. ceased to exist as a separate entity.

"(g) Defendant Diced Cream of America Co. is a Delaware corporation (sometimes hereinafter referred to as 'Diced') with its principal place of business located in Los Angeles County, California. Said defendant is engaged primarily in the business of leasing machines upon which it owns patents for packaging an individual serving of ice cream, sherbet or ice milk of a standardized quality under the trade name of 'Diced Cream,' and in the business of selling cartons for use in said machines. The consideration for all of the common stock of said defendant was paid for by Arden and the stock was issued to voting trustees pursuant to a Voting Trust Agreement. The corresponding voting certificates were issued to Arden and on September 1, 1949, Arden distributed to its stockholders all of said voting trust certificates. * * *

"6. For several years prior to November 21, 1949, and particularly during that portion of the year 1949 up to November 21, 1949, the business of selling ice cream products in the State of California and particularly in the Los Angeles area had been very competitive. During said period Arden and its ice cream distributing subsidiaries sold their respective ice cream products at wholesale in virtually every city and local community throughout the Los Angeles area, but many of their competitors sold their ice cream products at wholesale in only a portion of the Los Angeles area and some in only one or two cities or local communities in said Los Angeles area. The plaintiff sold its ice cream products only in a portion of the Los Angeles area. Every ice cream products manufacturer and jobber in the Los Angeles area, large and small, including the plaintiff, is and was a competitor of Arden and of its ice cream distributing subsidiaries. The business of Arden and of its ice cream distributing subsidiaries in selling ice cream products at wholesale were and are substantially and adversely affected by competitive conditions in every such city or local community. * * *

"7. For a number of years prior to the trial of this action, practically all the ice cream products manufacturers including Arden and its ice cream distributing subsidiaries selling at wholesale in the State of California published price lists of their respective ice cream products although there was no legal requirement for such publication. For several years prior to November 21, 1949, said published price lists did not represent the actual selling prices at

by maintaining at the same time higher prices for the same products in other areas, such as the northwest. (2) It is claimed that the District Court required plain-

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wholesale of a substantial quantity of ice cream products sold in said area. During said period competitors of Arden and its ice cream distributing subsidiaries in the Los Angeles area made numerous changes and deviations from their respective published price lists resulting in lower selling prices for ice cream products thus enabling said competitors to gain a larger share of the ice cream products trade in said area. During said period said competitors were offering and gave inducements to prospective customers at wholesale, such as gratuities, rebates and discounts, free services, free material and equipment, free use of material and equipment, and the like, as a means of selling their respective ice cream products. During said period said competitors in the Los Angeles area and other areas in the State of California offered to sell and sold ice cream products at wholesale at prices as low or lower than the prices (after any and all rebates and discounts) established by Arden on November 21, 1949, hereinafter referred to, for ice cream products of like grade, quality and quantity in said areas. For some time prior to November 21, 1949, competition in the business of selling ice cream products at wholesale in said areas was so intense that the price structure for said products was very badly broken down. Said competitive activities of said competitors substantially and adversely affected the ice cream products business of Arden and of its ice cream distributing subsidiaries in said areas.

"8. For several years prior to November 21, 1949, and particularly during that portion of the year 1949 up to November 21, 1949, Arden and its ice cream distributing subsidiaries, in order to retain their customers and to gain new ones, in many instances met or attempted to meet the lower competitive prices of their competitors in the State of California and particularly in the Los Angeles area in the sale of their respective ice cream products. During said period Arden and its ice cream distributing subsidiaries in said areas made numerous changes and deviations from their respective published price lists to meet or in attempting to meet said lower competitive prices of their competitors in said areas. The average net selling price for all ice cream products sold by Arden gradually declined during the year 1949. * * *

"9. In 1946 and 1947 there came into being a product known as Foster Freeze, an ice milk product which spread rapidly through the establishment of stores where soft ice milk was sold. Similar stores had existed before but the Foster product gave impetus to their growth. In 1948 and that portion of the year 1949 prior to November 21, 1949, stores and business establishments in the State of California and particularly in the Los Angeles area selling

tiffs to prove that Arden was motivated by a purpose or intent to harm a competitor, whereas it is contended the statute does not require such proof. (3) It is claimed

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soft ice milk were in competition with stores and business establishments selling ice cream products and the former were successful in securing a substantial portion of the ice cream products trade in said areas. The ice cream products business of Arden and of its ice cream distributing subsidiaries was substantially and adversely affected by the competition from the sale of said soft ice milk.

"10. During the period here involved a number of ice cream products manufacturing plants in the Los Angeles area and other areas in the State of California (sometimes hereinafter referred to as 'captive creameries') were owned by large grocery chains or other chain retail outlets, and such plants manufactured ice cream products solely for such owners. The number of such plants increased during the years 1948 and 1949. The retail outlets supplied by captive creameries in said areas sold certain of said ice cream products so manufactured by captive creameries during the year 1948 and that portion of the year 1949 prior to November 21, 1949, at prices lower than the wholesale prices for ice cream products of like grade, quality or quantity being charged by other ice cream products manufacturers in said areas including Arden and its ice cream distributing subsidiaries. The quantity of ice cream products sold by the retail outlets supplied by captive creameries in said areas was substantial. Other markets, chains and independent stores in said areas, having no interest in captive creameries, in order to meet said prices of the retail outlets supplied by captive creameries demanded lower prices at wholesale from their respective ice cream products manufacturers. Customers of Arden and its ice cream distributing subsidiaries were in competition with retail outlets supplied by captive creameries and said customers made demand on Arden and its ice cream distributing subsidiaries for lower prices at wholesale for ice cream products in order to sell at competitive prices. * * *

"11. The total quantity of ice cream products sold by Arden and its ice cream distributing subsidiaries in the State of California and in the Los Angeles area for the years 1946 to and including the year 1950 are as follows:

	Los Angeles Area	State of California
1946	7,191,396 gals.	11,057,662 gals.
1947	6,471,274 gals.	9,166,377 gals.
1948	5,029,405 gals.	7,783,031 gals.
1949	4,376,617 gals.	6,876,637 gals.
1950	4,200,673 gals.	6,803,312 gals.

"The decline in gallonage was substantially due to competitive conditions herein found to exist in the Los Angeles area and other

that the District Court required plaintiffs to disprove the existence of an alleged affirmative defense that Arden was meeting in good faith the equally low price of a

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areas of the State of California, and to other competitive conditions shown by the evidence in this action.

"12. The percentage of ice cream products in gallons sold by Arden and its ice cream distributing subsidiaries in the Los Angeles area to the total ice cream products in gallons manufactured by all ice cream products manufacturers in the Los Angeles area for the years 1946 to and including 1950 are as follows:

1946	23%
1947	22%
1948	20%
1949	18%
1950	17%

"The decrease in sales was substantially due to competitive conditions herein found to exist in the Los Angeles area and to other competitive conditions shown by the evidence in this action.

"13. * * * The percentage of ice cream products in gallons sold by plaintiff and the plaintiffs in said fourteen actions in the Los Angeles area to the total quantity of ice cream products in gallons manufactured in the Los Angeles area during said years was as follows:

1946	11%
1947	11%
1948	13%
1949	13%
1950	13%

"14. During the year 1948 and that portion of the year 1949 prior to November 21, 1949, Arden made continuous efforts to meet the competitive conditions herein found and other competitive conditions shown by the evidence in this action, by bringing out new items in its line of ice cream products, increasing its advertising and merchandising campaigns and instilling more life into its sales organization. Said efforts were not successful in stopping Arden's continuous decline in the total sales of ice cream products in the State of California nor in the Los Angeles area * * *

"15. The main items of cost in the manufacture of ice cream products are butterfat, serum solids and labor, the latter customarily being measured in man hours. For some time prior to November 21, 1949, the cost of said items to Arden, in general, gradually declined and continued to decline until May, 1950. During 1949 and 1950 the cost of butterfat was at its lowest point in May, 1950.

"16. From the latter part of December, 1948, until November 21, 1949, the officers and directors of Arden were very critically

competitor when it made the differential in prices in the Los Angeles area, whereas the statute placed the burden of pleading and proof upon the defendants. (4) Further,

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concerned with said competitive conditions. The published price lists at wholesale of ice cream products manufacturers in the State of California and in the Los Angeles area were unrealistic. On November 14, 1949, it was the conclusion of said officers and directors, after long and mature consideration, that there was only one way to remedy the situation created by the competitive conditions herein found to exist and other competitive conditions shown by the evidence in this action and that was for Arden to establish lower prices at wholesale for its ice cream products in order to compete with said competitive conditions. On or about November 19, 1949, Arden published a new price list reducing the prices at wholesale for its respective ice cream products except frozen novelties and Diced Cream. The prices of said latter products remained the same. Said published price list became effective on November 21, 1949, and will sometimes hereinafter be referred to as the "price reduction of Arden." The prices (after any and all rebates and discounts) established by Arden in the Los Angeles area and in other areas of the State of California on said date were not lower than the prices at wholesale of its competitors on or before November 19, 1949, for ice cream products of like grade, quality and quantity in the Los Angeles area and other areas in the State of California. The prices established by the price reduction of Arden were in effect until October 18, 1950, when said prices were increased by reason of Arden's increased costs.

"17. Said officers and directors, concurrently with said price reduction, in order to bring all items of expense to a minimum, initiated and put into effect a series of changes in Arden's methods of manufacturing, distributing and selling its ice cream products, resulting in the elimination of all unnecessary expenses, the reduction of personnel, the reduction of advertising expenses, the reorganization of Arden's sales department and manufacturing department, and the simplification of Arden's line of ice cream products. Said changes resulted in a substantial decrease in the total cost of Arden of the ice cream products manufactured, distributed and sold by it.

"18. The prices established by the price reduction of Arden and the sale by it of ice cream products at such prices were made in good faith to meet the lawful and equally low prices of its competitors in the sale of ice cream products of like grade, quality and quantity, and were made by reason of competitive conditions herein found and other competitive conditions shown by the evidence in this action. The action of the officers and directors of Arden in establishing said price reduction and the prices so established by

it was claimed under the facts of the instant case that even this affirmative defense was not available to Arden under the statute for these reasons. Arden, it is said,

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Arden for its ice cream products was justified by business and economic considerations of the type which reasonable men take into consideration in making such a decision when confronted with said competitive conditions and other factors affecting Arden's business, such as, diminishing sales. The action of Arden in establishing said prices and selling its ice cream products at such prices was reasonable.

"19. Frigid reduced the prices at wholesale of its frozen novelties on October 24, 1949. It did not thereafter prior to the trial of this action reduce the prices of its frozen novelties. In the latter part of November, 1949, Frigid reduced the price at wholesale of its bulk and packaged ice cream to its route-delivered customers. Said price reduction will sometimes hereinafter be referred to as the 'price reduction of Frigid.' The quantity of bulk and packaged ice cream sold by Frigid to its route-delivered customers was small as compared to its total business. The prices established by the price reduction of Frigid and the sale by it of ice cream products at such prices on or about that time in the ice cream products industry in the Los Angeles area, and by reason of the competitive conditions herein found and other competitive conditions shown by the evidence in this action. The prices (after any and all rebates and discounts) established by the price reduction of Frigid in the Los Angeles area were not lower than the prices at wholesale of its competitors prior to and at the time of said reduction for ice cream products of like grade, quality and quantity in the Los Angeles area. At no time here in question did any defendant other than Frigid set or attempt to set the prices at which Frigid sold its ice cream products.

"20. The prices established by the price reduction of Frigid and the sale by it of ice cream products at such prices were made in good faith to meet the lawful and equally low prices of its competitors in the sale of ice cream products of like grade, quality and quantity and were made by reason of competitive conditions herein found and other competitive conditions shown by the evidence in this action. * * *

"21. Holly-Maid reduced the price at wholesale of its ice cream products on November 30, 1949, except frozen novelties and Diced Cream. The price of said latter products remained the same. Said price reduction will hereinafter sometimes be referred to as the 'price reduction of Holly-Maid.' The prices established by the price reduction of Holly-Maid and the sale by it of ice cream products at such prices were made to meet the prevailing prices on or about that time in the ice cream products industry in the Los

(a) did not meet "individual competitive situations," but blanketed a local area with a market-wide price cut, (b) took such action offensive in nature rather than of a

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Angeles area and by reason of the competitive conditions herein found and other competitive conditions shown by the evidence in this action. * * *

"22. The prices established by the price reduction of Holly-Maid and the sale by it of ice cream products at such prices were made in good faith to meet the lawful and equally low prices of its competitors in the sale of ice cream products of like grade, quality and quantity and were made by reason of competitive conditions herein found and other competitive conditions shown by the evidence in this action. * * *

"23. On and subsequent to November 21, 1949, several substantial competitors of Arden, Frigid and Holly-Maid published price lists at wholesale for and sold ice cream products in the Los Angeles area at prices lower than the prices established by and at which Arden, Frigid and Holly-Maid sold ice cream products of like grade, quality and quantity in the Los Angeles area on and after said date.

"24. Arden of Arizona manufactures ice cream products in Phoenix, Arizona, and all of the ice cream products it manufactures are sold by it within the State of Arizona. There are a number of other ice cream manufacturing plants in the State of Arizona owned by third parties and all of the ice cream products manufactured by said plants are sold in competition with the ice cream products sold by Arden of Arizona. The prices at which Arden of Arizona sold its ice cream products at wholesale from time to time were based on competitive conditions in the State of Arizona and upon its costs in said state. * * *

"25. In September, 1949, Arden of Arizona began the sale of Diced Cream at wholesale to its customers in Arizona. On or about said time, Arden of Arizona did not have a machine for packaging and processing Diced Cream but ordered such a machine the latter part of 1949, and it was installed in September, 1950. During the period of that time that Arden of Arizona was acquiring and installing its own machine for packaging and processing Diced Cream, it purchased Diced Cream from Arden. Arden of Arizona, in most instances, acquired said Diced Cream from Arden with its own trucks at the manufacturing plant of Arden in Los Angeles and in a few instances, Diced Cream was shipped by Arden to Arden of Arizona by public carrier f.o.b. Los Angeles. The price at which Arden of Arizona sold Diced Cream in the State of Arizona during the period of time it purchased Diced Cream from Arden was substantially the same as that charged by Arden and its ice cream distributing subsidiaries in the State of California. At all times after September, 1950, Arden of Arizona has packaged and

limited defensive character, and (c) did not show that any competitor's price it claimed to meet was a lawful price or that its lowered price was for a product of the

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processed all Diced Cream sold by it in Arizona. No ice cream products sold by Arden of Arizona were transported across state lines other than the Diced Cream mentioned in this finding.

"26. * * * Each defendant manufacturing, distributing and selling ice cream products, in making each and every decision with respect thereto, and in the establishment of each and every price, acted solely upon its individual judgment and without agreement or understanding with or participation by any person, firm or corporation whether a defendant herein or not.

"27. The respective price reductions made by Arden, Frigid and Holly-Maid were not the result of any concert of action, combination in the form of a trust or otherwise, conspiracy, plan, scheme or agreement among the defendants, or any one or more of them.

"28. Each officer and director of Arden, each officer and director of Frigid and each officer and director of Holly-Maid who had anything to do with the respective price reductions of said defendants, in so acting did not act in an individual capacity but within the scope of and in the course of his employment as such officer or director. The decisions of the officers and directors of each of said defendants * * * was a decision with respect to a lawful business policy * * *.

"29. The respective price reductions of Arden, Frigid and Holly-Maid were not drastic, and the prices at which each said defendant sold its ice cream products on and after said respective price reductions were not unreasonably low. Said price reductions and each of them bore a realistic and reasonable relation to the previous price changes and the prices charged by their respective competitors in the ice cream products market in the Los Angeles area and in other areas in the State of California. * * *

"30. No defendant, in the doing of any act or acts herein found or shown by the evidence, was actuated by any purpose, design or intent to restrain, lessen, stifle, burden or otherwise interfere with trade or commerce between the several states, or any part thereof, in the manufacture, distribution or sale of ice cream products, and no part of said trade or commerce was unlawfully restrained, lessened, stifled, burdened or otherwise interfered with by any act of the defendants, or any one or more of them.

"31. No defendant, in the doing of any act or acts herein found or shown by the evidence, was actuated by any purpose, design or intent to prevent or destroy competition or to injure or destroy plaintiff or plaintiff's business or to exclude or eliminate plaintiff or any other person, firm or corporation from the business of manufacturing, distributing or selling ice cream products in the

same grade and quality as that of a competitor or for sales of the same quantity.

Arden is one of the largest dairy products firms in the west. It owns in Los Angeles an ice cream plant which

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Los Angeles area, or in any other area, or in interstate commerce, or any part thereof. The Court makes no findings as to whether any act or acts of the defendants, or any of them, had any effect upon the business of plaintiff, or any profits derived therefrom, caused plaintiff any injury, for the reason that the Court finds that all of the acts of the defendants complained of were legal.

"32. No defendant, in the doing of any act or acts herein found or shown by the evidence, was actuated by any purpose, design or intent to monopolize, nor did any defendant alone, or acting in concert, with others, attempt to monopolize the business of manfacturing, distributing or selling ice cream products in the Los Angeles area, nor any other area, nor in interstate commerce, or any part thereof. No defendant alone, or acting in concert among themselves or with others, monopolized or had the power to monopolize said business, or any part thereof. No. act or acts herein found or shown by the evidence, of any defendant, has had or now has a tendency to create a monopoly in the ice cream products business in the Los Angeles area, or any other area, or in interstate commerce, or any part thereof.

"33. There are a number of ice cream manufacturing plants in Washington and Oregon owned by third parties and all of the ice cream products manufactured by said plants are sold at wholesale in competition with the ice cream products sold at wholesale by Arden in Washington, Oregon, Idaho, Montana and a small portion of Northern California served with ice cream products manufactured by Arden in Oregon. The prices at which Arden sold its ice cream products in Washington, Oregon, Idaho, Montana and the small portion of Northern California served with ice cream manufactured by Arden in Oregon at wholesale from time to time, were based on competitive conditions in said respective states and upon its costs in said respective states.

"34. The prices charged by any defendant manufacturing, distributing or selling ice cream products in any state referred to herein, has and had no effect on the prices charged by the said defendant, or any other defendant, or by any other person, firm or corporation, manufacturing, distributing or selling ice cream products in any other state. By reason of competitive conditions and variations in costs existing in the respective states, there is no reason for any similarity between the prices at which the respective ice cream products are sold in each of the said states.

"35. In September, 1947, Arden began the sale of Diced Cream in the Los Angeles area and since said time has continuously sold

is one of the largest in the United States. It does some interstate shipping out of its Portland, Oregon, office into the State of Washington and out of its Spokane, Wash-

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Diced Cream in said area. Diced Cream has not been sold by Arden in Oregon, Washington, Iadho or Montana. Shortly after Arden began the sale of Diced Cream in the Los Angeles area, certain of its competitors in said area also sold a package of ice cream, sherbet or ice milk containing a single serving. * * *

"36. No defendant or group of defendants in the Los Angeles area or in any area referred to herein, has or had a monopoly in the business of manufacturing, packaging, distributing or selling a packaged individual serving of ice cream. * * *

"37. The total quantity of Diced Ice Cream sold by Arden in 1949 and 1950 in the Los Angeles area was as follows:

1949 ..... 727,276 gals.
1950 ..... 580,032 gals.

* * *

"39. In 1949 Arden made a net profit on the manufacture, distribution and sale of ice cream products in the Los Angeles area of approximately $260,000.00, and in the year 1950 Arden made a net profit on the same activities and in the same area of approximately $240,000.00. Said profit was and is reasonable.

"40. There is no agreement, arrangement nor understanding between Arden and Shopping Bag Food Stores, referred to in the complaint as 'Shopping Bag Markets or Shopping Bag Companies,' nor between Arden and Mayfair Markets, referred to in the complaint also as 'Mayfair Companies,' nor between Arden and Godfrey Food Company, Inc., referred to in the complaint as 'El Rancho Market,' nor between Arden and any other person, firm or corporation in the Los Angeles area, or any other area, wherein the party other than Arden agreed to purchase all or any substantial part of its ice cream products from Arden, or wherein the party other than Arden agreed not to use or deal in ice cream products of any competitor of Arden or its ice cream distributing subsidiaries. * * *

"43. At all times here in question, the ice cream products manufactured by Arden in the State of Washington have been distributed and sold by it at wholesale in the States of Washington, Idaho and Montana; the ice cream products manufactured by Arden in the State of Oregon have been distributed and sold by it at wholesale in the States of Oregon and Washington and in a small portion of Northern California; and the ice cream products manufactured by Arden in California have been distributed and sold by it at wholesale in the State of California. The total quantity of ice cream products (1) manufactured by Arden and transported by it across state lines for direct sale to wholesale route-delivered cus-

ington, division to Idaho and Montana. It sells at Seattle, Washington, and at Los Angeles, California, ice cream to interstate carriers. The Arizona subsidiary obtains from Arden at Los Angeles ice cream products for sale in Arizona and for use on an interstate carrier. The San Diego plant distributes ice cream products in Mexico. In addition, Arden is the only manufacturer in California which produces or sells a patented product known as "diced cream."

There are various levels in the ice cream industry. One is known as "wholesale route-delivered customers," and another consists of the "distributors" or "jobbers." There is also an institutional type of ice cream customer known as "bid business."

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tomers and (2) manufactured by Arden and transported by it across state lines to its own distributing plants in other states does not exceed 3.08% of the total quantity of ice cream products manufactured by it. Of said 3.08% of ice cream products only eight tenths of one per cent is transported by Arden across state lines for direct sale to wholesale route-delivered customers. Arden, in the manufacture, distribution and sale of ice cream products, was engaged in commerce among the several states.

"44. At all times here in question, the plaintiff manufactured, distributed and sold ice cream products at wholesale only in a portion of the Los Angeles area, and plaintiff, in the manufacture, distribution and sale of ice cream products, was not engaged in commerce among the several states. Plaintiff does not and did not at any time compete with any defendant herein selling ice cream products at wholesale in any area other than the Los Angeles area.
* * *

"45. * * * Any such differential in price did not substantially lessen competition or tend to create a monopoly in ice cream products for Arden in either state where any such differential may have existed.
"* * *

"47. Plaintiff has not suffered any damage by reason of any act or acts of the defendants, or any of them, alleged in the complaint for which recovery can be had under any federal antitrust statute or law.
" * * * * * *."

Although, during World War II, there was a great increase in ice cream sales, after the war there was a marked decrease for several years and keen competition prevailed in the Los Angeles area. Arden introduced diced cream in 1947, and plaintiffs claim Arden started an offensive to drive ordinary ice cream out of the market in June, 1949.

The first proposition is that the findings of fact were all in favor of defendants and against plaintiffs. We have examined the evidence and find that none of the findings was clearly erroneous.

Some of the factual contentions of plaintiffs, not proven to the trier of fact, follow.

It was claimed that Arden bought a large block of shares of preferred stock in the Shopping Bag Food Stores for $200,000.00, and that, as a result thereof, this chain has sold Arden ice cream exclusively, while Balian, one of the plaintiffs, simultaneously lost the ice cream business of Shopping Bag. From this it was sought to make out a violation of 15 U. S. C. A. §14. But the trial court found that Arden entered into no exclusive dealing contract with any of its customers, and the finding was not clearly erroneous.

It was contended that on Saturday, November 19, 1949, effective Monday, November 21, 1949, while continuing without change its prices in the northwest and Arizona, Arden cut the price of ice cream in the Los Angeles area with great secrecy. The price cut in ordinary ice cream supposedly was intended to convert customers to the use of diced ice cream, which, of course, cost more. Arden Vice-President Tongue pointed out that the price of diced cream was not cut because "it is an article we were introducing into the market."

Plaintiffs contended they felt the price cut in two different ways. Quite a number of them attempted to maintain their volume by cutting prices in line with Arden. Others did not cut prices on certain items or did not cut prices sufficiently to hold their volume. In all cases, plaintiffs claimed to have suffered extensive losses of revenue as compared with their operations at their price scale existing immediately before the price cut. Arden's revnue in the Los Angeles area was likewise reduced by the price cut. It was said that the price cut in late 1949 came at the most critical and difficult time of the year for those companies solely dependent upon ice cream. In the middle of July, 1950, several of the ice cream manufacturers and distributors made an effort, which was ineffectual, to restore their prices to the level existing before the cut.

It was also contended by plaintiffs that Arden was so fearful that its income would not keep up after the price cut that they discharged a great many salesmen from the ice cream sales department and reduced their refrigeration repair staff. A contention is also made that Arden pared down its ice cream advertising budget and cut mechanical cabinet expenses to the bone. Plaintiffs also claim that Arden was able to recoup its losses from other geographical areas and from profits from the sales of milk, cream, skim milk, powdered milk, butter, cottage cheese, egg, salad dressing and related products.

The "blanket price cut," so called in this area, was unquestionably necessary in the opinion of Arden to eliminate a great many of the chiselling cuts, special advantages and rebates given by its competitors in this very area. It must be remembered that this was not a true blanket cut, since the diced ice cream was held at a

high level. There seems to be but little doubt that Arden expected the price cut might cause it a loss on this particular brand of ice cream upon which it was required by the condition to keep the price up. Far from being impressed with the fact that Arden put on an austerity campaign in its own organization in the Los Angeles area and tightened its belt to meet competitive conditions over a large area, we conceive the circumstance seems rather to emphasize the fact that it was attempting to meet competition.

On October 11, 1950, one of the plaintiffs filed its action against Arden. A week later, Arden raised the price of some brands of ice cream, and in two further steps on December 15, 1950, and on January 13, 1951, increased its price to a level which is now apparently satisfactory to plaintiffs. The price war was thus at an end. Plaintiffs say that Arden was not in good faith in its concern about the loss of ice cream volume in this area and of certain combinations which tended to destroy its markets. Also, plaintiffs say it was not for the purpose of meeting the various devices of competitors and other lower prices introduced in the area and special favors given by others, but that the intent was to better the market for diced cream and to hurt their competitors financially.

The court, however, found that Arden had actually acted in good faith to meet the low prices of some of its competitors. This finding is not destroyed because it failed to introduce evidence of the quality of the product of the competitor or the quantity of the sales of the competitor. It was not incumbent upon Arden to establish, under the circumstances of this case, the lawfulness of the prices which it claimed to meet. And, even if Arden

had gone beyond the technical limits of meeting an equally low price of a competitor and placed the price lower than any competitor, it would not have been a violation of this statute. The offensive action, which it is suggested Arden indulged in, means no more than that it did not actually put in effect a blanket price reduction, but excepted one, diced ice cream, from the cut. This was not evidence of offensive action, but one of the necessities of competition.

It is obvious that Arden, by selling ice cream products in the Los Angeles area at a lower price than it charged for like products in other states, did not violate §2(a) of the Clayton Act, as amended, 15 U. S. C. A. §13(a).[2]

Plaintiffs' principal contention on appeal seems to be that, because they had an established price in the Los Angeles area at which they were making money, no one could cut the prices for the benefit of the public in that area unless it cut prices in every other area in which it did business. The implication of the arguments of plaintiffs is that prices can never be lowered by a concern, which does any interstate business, in one area if it fails to make a corresponding cut in every locality where it does business. This postulate need not be debated under the fact here. It may be said Congress did not put a floor under all existing prices so these could never be lowered by a firm doing interstate business. Certain economists contend for this construction. Such a situation would not be in the public interest. The people are interested in obtaining goods at the lowest price possible, if competition is not vitally affected thereby. The assumption suggested above would ring the death

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[2]Amended by the Robinson-Patman Act, June 19, 1936, c. 592, §1, 49 Stat. 1526.

knell of competition. Even if it were shown that Arden undercut the prices of poorer quality products, it would not be unfair if the general purpose were to eliminate improper rebates and special concessions made by its competitors. Plaintiffs seem to urge as a defense that the prices which they were charging and the concessions which they made were in some instances illegal, but that, notwithstanding this fact, Arden could not fight against these by making a blanket cut on all ice cream sold in the area. But it is well established that "Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically to curtail it that a seller would have no substantial right of self defense against a price raid by a competitor."[3]

The court found also that there was no causal connection between the different prices of ice cream sold by Arden in Arizona, Washington and Oregon and any damage sustained by plaintiffs as a result of the lowering of prices in the Los Angeles area. There was absolutely no evidence in the record that the differentials as to sales in commerce or in other areas had any relation to any injury or damage which plaintiffs may have sustained. It is true that Arden in certain respects engages in interstate commerce, but it does not follow that the price differential in different areas have any relation to each other, even if sales involving interstate commerce were given consideration. The finding of the court that the price differential between the different areas was not unfair as respects plaintiffs was well founded. The customers of Arden in the respective areas are not in competition with each other, and the products sold in

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[3]Standard Oil Co. v. Trade Commission, 340 U. S. 231, 249.

each area are sold in competition with like products manufactured by others. The prices in each area are based upon the cost of production and competitive conditions based upon like products manufactured by others. Moreover, Arden had other competitors in the Los Angeles area besides plaintiffs. It did seventeen per centum of the business only. Therefore, Arden was doing business in a number of largely disconnected, homogeneous, competitive areas. There simply was no reason for uniformity of price throughout these areas. Any revenue loss to plaintiffs as a result of the lowering of prices is merely one of the results of local competition.

It is also broadly stated in the argument that a differential in price in and of itself constitutes discrimination within the meaning of §2(a) of the Clayton Act, as amended.

But this postulate is universal, arrived at with insufficient bases. "Congress was dealing with competition which it sought to protect and monopoly which it sought to prevent."[4] There is no presumption set up anywhere that, merely because there is a differential in various areas, necessarily a price discrimination exists.

Plaintiffs seem to urge that, as competitors, they were protected by the statute from any lowering of prices by Arden on its products over a local, intrastate area of California. Although it is admitted, neither the materials nor the products so sold are shipped in interstate commerce, into which only three per centum of the products of Arden flow, the claim is made that Arden did not lower

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[4]Staley Manufacturing Co. v. Federal Trade Commission, 7 Cir., 135 F. 2d 453, 455, cited and quoted in Standard Oil Co. v. Trade Commission, 340 U. S. 231, 249.

prices on products sold in local areas in other states far distant where entirely different competitive conditions prevailed. But it must be remembered that differentials are not proscribed in the language of the statute. The statute requires that there be some discrimination.

It must be noted that there was not here involved a differentiation between purchasers from Arden of goods shipped in interstate commerce where the purchasers were in competition among themselves. This feature indicates a variance from Federal Trade Commission vs. Morton Salt Co., 334 U. S. 37. Arden did not embark upon a campaign by selling goods shipped in interstate commerce at a loss in a local area to punish or designedly try to cause loss to one weaker competitor. It had no design to eliminate such a competitor and put him out of business by giving guaranties against loss to its own sales customers. Therefore, the doctrine of Porto Rican American Tobacco Co. v. American Tobacco Co., 2 Cir., 30 F. 2d 234, has no relation to the situation here. Such a pattern is not entirely unfamiliar in the history of unfair competition in this country. Standard Oil Co. vs. United States, 221 U. S. 1; United States vs. American Tobacco Co., 221 U. S. 106. And, clearly, Moore v. Mead's Fine Bread Co., 348 U. S. 115, 118, does not apply, as there is no proof here of any destruction of competition or probability that any competitor would be destroyed or eliminated "as required by the amended §2(a) of the Clayton Act." Also, the holding of that case with respect to §3 of the Robinson-Patman Act, 15 U. S. C. A. §13a, has no bearing here. As noted, there was an express finding of lack of "purpose of destroying competition or eliminating a competitor." Consideration of §3 is no

longer involved in this case since plaintiffs do not challenge this finding.

But, even if discrimination be found, it is not in and of itself denounced, but only when deleterious consequences are probable, *i.e.*, "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination or with the customers of either of them." 15 U. S. C. A. §13(a), as quoted in Moore v. Mead's Fine Bread Co., 348 U. S. 115, 117.

The difference in price between various states did not substantially lessen competition or tend to create a monopoly in ice cream products. There was no evidence that trade or commerce, interstate or otherwise, was lessened or burdened by any action of defendants in this case. The findings of the trial court expressly negativing the existence of any such consequences or a possibility of such results were supported by substantial evidence.

Balian complains only of revenue loss. But this is attributable solely to the intensely competitive Los Angeles ice cream market for which plaintiffs are partly responsible.

Plaintiffs complain that the District Judge required them to prove that defendants had an illegal intent to destroy competition, but this is not true. Of course, intent is not an essential factor to a §2(a) violation, although, if the intent to destroy were found to exist, it might tend to render the injury probable. The court did find that no defendant did any act with intent or design to prevent or destroy competition in the ice cream products business or with intent to restrain or lessen trade or commerce

between the several states. But this was made in negation of an allegation in plaintiffs' complaints charging such an intent and a conspiracy to carry it out.

It is clear, therefore, that the trial court was correct in holding that there was even *prima facie* no violation of the statute. But the court did not stop here.

There is an affirmative defense also given by the statute to defendants in the following terms:

> "* * * nothing contained in sections 12, 13, 14-21 and 22-27 of this title shall prevent a seller rebutting the *prima-facie* case thus made by showing that his lower price * * * was made in good faith to meet an equally low price of a competitor * * *." 15 U. S. C. A. §13(b).

The trial court made precise and exact findings covering this defense. It was found that the prices at which Arden sold its ice cream products in California were set up in good faith to meet the lawful and equally low prices of its competitors. Balian takes exception on two grounds: (1) that defendants were not put on proof with regard thereto; and (2) that the findings were incorrect. Where a case has been tried and the court makes no findings of fact, it cannot be said that, as trier of the fact, he is not entitled to consider any evidence in the record by whomever adduced in arriving at this result. The burden of proof and burden of going ahead with the evidence are then procedural rules for the guidance of the trial court. There was a fair trial here. The findings are supported on this point by substantial evidence and must be sustained. So, even if it were found that discrimination existed and tended to have the proscribed results, still the trial court found that the defense was established on the record.

The exception for changing conditions affecting specific goods, which is supposed to provide a defense for price discrimination under the statute, has no application in the case at bar. 15 U. S. C. A. §13(a). The trial court found that there was no joint action of Arden and its supposed satellites in depressing prices. Therefore, the action taken was not illegal *per se* under the Sherman Act or otherwise.

The court also found that the action of defendants was not a violation of the California Anti-Trust laws. This action was brought under the Sherman Act. There was an attempt to join this cause with a cause under the diversity of citizenship provisions. One such cause in each case was brought only against the defendants as to whom complete diversity of citizenship between plaintiff and defendant exists. The causes based upon the Clayton Act were brought against all of the defendants. It is attempted to justify this joinder on the ground that the District Court had jurisdiction over the federal causes and therefore, under the doctrine of pendent jurisdiction, also had authority to hear this non-federal cause. However, such a contention is not well founded.

It is perfectly true that the history of competition in the United States furnishes many instances where consolidated corporations or so-called trusts have dropped prices in order to eliminate the individual competitor, and there is no doubt that one of the legislative purposes in the Clayton Act and the Robinson-Patman Act was to meet such unlawful activity. But this is not such a case.

The judgment is affirmed.

(Endorsed:) Opinion. Filed Oct. 31, 1955.

Paul P. O'Brien, Clerk.

APPENDIX B.

Judgments of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

The Balian Ice Cream Company, Inc., a Corporation, Appellant, vs. Arden Farms Company, a Corporation, *et al.*, Appellees. No. 13578.

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

(Endorsed) Judgment.

Filed and entered October 31, 1955.

Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit.

F. and A. Ice Cream Company, Appellant, vs. Arden Farms Company, a Corporation, *et al.*, Appellees. No. 13579.

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

(Endorsed) Judgment.

Filed and entered October 31, 1955.

Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit.

Colonial Ice Cream Company, Inc., Appellant, vs. Arden Farms Company, a Corporation, *et al.*, Appellees. No. 13580.

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

(Endorsed) Judgment.

Filed and entered October 31, 1955.

Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit.

Minick's Ice Cream Company, Inc., Appellant, vs. Arden Farms Company, a Corporation, *et al.*, Appellees. No. 13581.

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

(Endorsed) Judgment.

Filed and entered October 31, 1955.

Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit.

Paramount Ice Cream Corporation, Appellant, vs. Arden Farms Company, a Corporation, *et al.*, Appellees. No. 13582.

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

(Endorsed) Judgment.

Filed and entered October 31, 1955.

Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit.

H. L. Beckley and J. H. Kuhns, etc., Appellants, vs. Arden Farms Company, a Corporation, *et al.*, Appellees. No. 13583.

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

(Endorsed) Judgment.

Filed and entered October 31, 1955.

Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit.

Howard B. Lawrence, etc., Appellant, vs. Arden Farms Company, a Corporation, *et al.*, Appellees. No. 13584.

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

(Endorsed) Judgment.

Filed and entered October 31, 1955.

Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit.

H. B. Henry, etc., Appellant, vs. Arden Farms Company, a Corporation, *et al.*, Appellees. No. 13585.

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

(Endorsed) Judgment.

Filed and entered October 31, 1955.

Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit.

James Coykendall, etc., Appellant, vs. Arden Farms Company, a Corporation, *et al.*, Appellees. No. 13586.

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

(Endorsed) Judgment.

Filed and entered October 31, 1955.

Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit.

David Bresler, *et al.*, Appellants, vs. Arden Farms Company, a Corporation, *et al.*, Appellees. No. 13587.

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

(Endorsed) Judgment.

Filed and entered October 31, 1955.

Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit.

W. I. Ridgway, etc., Appellant, vs. Arden Farms Company, a Corporation, *et al.*, Appellees. No. 13588.

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

(Endorsed) Judgment.

Filed and entered October 31, 1955.

Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit.

Walter M. Temple, etc., Appellant, vs. Arden Farms Company, a Corporation, *et al.*, Appellees. No. 13589.

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

(Endorsed) Judgment.

Filed and entered October 31, 1955.

Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit.

Ivan P. Whatan, etc., Appellant, vs. Arden Farms Company, a Corporation, *et al.*, Appellees. No. 13590.

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

(Endorsed) Judgment.

Filed and entered October 31, 1955.

Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit.

Martin H. Brand, etc., Appellant, vs. Arden Farms Company, a Corporation, *et al.*, Appellees. No. 13591.

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

(Endorsed) Judgment.

Filed and entered October 31, 1955.

Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit.

Eugene L. Collier, etc., Appellant, vs. Arden Farms Company, a Corporation, *et al.*, Appellees. No. 13592.

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

(Endorsed) Judgment.

Filed and entered October 31, 1955.

Paul P. O'Brien, Clerk.

APPENDIX C.

Order of the United States Court of Appeals for Ninth Circuit Denying Petitions for Rehearing After Timely Filing Thereof.

United States Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Tuesday, December 27, 1955.

Before: STEPHENS and FEE, Circuit Judges, and LING, District Judge.

ORDER DENYING PETITIONS FOR REHEARINGS.

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of Appellants, filed November 30, 1955, and within time allowed therefor by rule of Court for rehearings of the above causes, be, and each of them hereby is denied.

APPENDIX D.

Summary of Documentary Record Reflecting the Policy of Arden Farms Co. on Local Price Cutting as Stated by Its President, S. H. Berch.

In a series of documents written during the price war in the Los Angeles area the president of Arden Farms Co., S. H. Berch, explained the effectiveness of Arden's policy of local price cutting. The minutes of the corporation's operating committee show Berch as stating:

". . . we were responsible for reducing the prices of ice cream and the dealer received the benefit." (Ex. 5, Appx. X.)

Berch as head of Arden's interstate operation wrote to a manager of a subsidiary and stated:

"I can't imagine a competitor . . . who will not meet these new selling prices for ice cream; otherwise, he will lose his business to you . . ." (Ex. 10D, Appx. XVIII.)

Again Berch wrote:

"The reason it is important to get these new selling prices into the hands of all ice cream dealers there is because your selling prices are lower than theirs [competitors] . . . the more attractive selling prices you have to offer should make a favorable impression upon the dealers, and act as an entering wedge for your men . . ." (Ex. 10K, Appx. XXI.)

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IN THE

Supreme Court of the United States

October Term, 1955

No. 672

THE BALIAN ICE CREAM CO., INC., a corporation,
Petitioner,

vs.

ARDEN FARMS CO., a corporation, *et al.*,
Respondents.

(And Fourteen Companion Cases).

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

All respondents in these fifteen cases join in this single brief in opposition to the petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Said petition raises the same issues in all fifteen cases. Our reference to the above entitled case will, therefore, be applicable to all the other cases.

Questions Presented.

Petitioner's statement of the questions presented is inaccurate in the light of the findings of the District Court and the decision of the Court of Appeals. The District Court not only found that petitioner had failed to prove a *prima facie* case, but went further and found that re-

spondents' defense of "meeting competition", among others, was established, and the Court of Appeals held such findings were supported by substantial evidence. Consequently, respondents submit the following as their own statement of the questions presented:

1. Is a mere difference in price of ice cream products sold by respondent Arden Farms Co. in two widely separate geographical areas a *prima facie* violation of Section 2(a) of the Clayton Act, where the District Court made the following findings and the Court of Appeals held that such findings were supported by substantial evidence:

(a) That such respondent doing both local business and interstate business in good faith uniformly reduced prices locally by reason of competitive conditions, which reduction was not made for the purpose of destroying competition or eliminating a competitor.

(b) That the prices of such respondent in each area were fair and reasonable and were based upon competitive conditions and variations in costs in said areas and there was no reason for similarity in prices between the two areas.

(c) That the differentials in price of such respondent did not affect competition, tend to monopolize or eliminate any competitor or unlawfully restrain, lessen, stifle, burden or otherwise interfere with interstate commerce.

2. Assuming for the purpose of argument that the circumstances shown by the foregoing question show a *prima facie* violation of Section 2(a) of the Clayton Act,

would the defense of "meeting competition" under Section 2(b) of the Act be established when:

(a) respondent's price reduction was made to all customers throughout the local area in an attempt to meet equally low prices of competitors to certain customers located within said area, and

(b) respondent shows that its ice cream products which were reduced in price in the local area are in competition with like ice cream products sold by its competitors.

Statement of the Case.

Petitioner's statement of the case is incomplete and gives an inadequate impression of the nature of the action and the issues involved. Without pointing out in detail the omissions in petitioner's statement, respondents desire to make their own statement of the case.

Although petitioner in the complaint charges respondents with numerous acts in violation of the Antitrust Laws, the petition here is confined to one act of one respondent, namely, Arden Farms Co.,[1] claimed to be in violation of Section 2(a) of the Clayton Act. The act of respondent Arden relied upon by petitioner was its uniform reduction in the price of certain of its ice cream products on November 21, 1949, to customers in the Los Angeles area.

Petitioner does not challenge any finding of fact. Consequently our statement of the case is based chiefly upon said findings.

---

[1]Arden Farms Co., a Delaware corporation.

Respondent Arden manufactures and sells ice cream products at wholesale in a number of western states [Fdg. 5(a); R. Vol. I, 150]. On November 21, 1949, it uniformly reduced the price of certain ice cream products by reason of competitive conditions in the Los Angeles area [Fdg. 16; R. Vol. I, 161-162].

Respondent Arden was engaged in interstate commerce, but only 8/10ths of 1% of all ice cream products manufactured by it was transported across state lines for direct sale to wholesale route delivered customers and not more than 3.08% of its total production was transported across state lines, including said 8/10ths of 1% [Fdg. 43; R. Vol. I, 175, 176].

Prior to said price reduction respondent's prices in the Pacific Northwest states were lower than its prices in the Los Angeles area, but after said price reduction the prices in the Pacific Northwest states were higher than in the Los Angeles area.[2] The price reduction in the Los Angeles area continued until January 1951, when the prices were restored to substantially their previous level [R. 2095; Fdg. 16, R. Vol. I, 161-162; Ex. 12C, R. Vol. II, 495].

The ice cream products sold by respondent Arden in the Los Angeles area were manufactured by it in said area and the ice cream products sold by it in other areas where it did business were manufactured by it and in general were sold in the State where they were manufactured with certain exceptions in the Pacific Northwest states

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[2]Petitioner's Brief in the Ninth Circuit, page 64, where it is stated: "Before the price cut Arden's prices in the Northwest were lower than Arden's prices in the Los Angeles Area" (citing numerous exhibits).

[Fdg. 43; R. Vol. I, 175-176]. In all areas where Arden did business it sold ice cream products in competition with other ice cream manufacturers. Arden's competitors in the Los Angeles area included Carnation, Challenge, Golden State, Swift & Company and many others, as well as petitioners in all fifteen cases [R. Vol. IV, 1609]. It also was in competition in said areas with large chain supermarkets and so-called "captive creameries" [Fdg. 10; R. Vol. I, 158-159].

For several years prior to November, 1949, the business of selling ice cream products in the Los Angeles area had been very competitive [Fdg. 6; R. Vol. I, 154]. Competitors of respondent Arden were offering and giving prices to customers at less than their published price list, giving gratuities, rebates, discounts, free service, free material and equipment as a means of selling their products, and during the said period Arden's competitors, including petitioner and others, offered to sell and sold ice cream at prices as low or lower than the prices established by respondent Arden on November 21, 1949, for like ice cream products in the Los Angeles area [Fdg. 7; R. Vol. I, 155-156].

Arden's sales had been declining for several years prior to 1949 and in the latter year Arden did only 18% of the business in the Los Angeles area [Fdg. 12; R. Vol. I, 159-160], and in 1950 during the price reduction its volume had declined to 17% in the Los Angeles area [Fdg. 12; R. Vol. I, 159] and its profits in 1950 were substantially the same as they were in 1949 and were found to be reasonable [Fdg. 39; R. Vol. I, 173-174].

Petitioner in each of the fifteen cases is an ice cream manufacturer who does business only in the Los Angeles

area [Fdg. 4; R. Vol. I, 150] and is not engaged in interstate commerce. Petitioners' customers do not compete in any area other than the Los Angeles area [Fdg. 44; R. Vol. I, 176].

During 1949 and 1950 the combined gallonage of all petitioners in said fifteen cases in the Los Angeles area remained substantially constant at 13% [Fdg. 13; R. Vol. I, 160]. No petitioner was eliminated as a competitor or forced out of business as a result of the price reduction [R. Vol. I, 132].

The prices established by Arden in the Los Angeles area for certain of its ice cream products on November 21, 1949, were not lower than the prices of a number of its competitors prior to said date for like products [Fdg. 16; R. Vol. I, 161-162]. Arden's price reduction was not unreasonably low and bore a reasonable relation to said respondent's previous prices and the prices of its competitors in the Los Angeles area and were fair and reasonable [Fdg. 29; R. Vol. I, 169-170].

Respondent Arden in reducing its prices was not actuated by any purpose, design or intent to restrain, lessen, stifle or burden interstate commerce in the manufacture, distribution or sale of ice cream products and no part of said trade or commerce was unlawfully restrained, lessened, stifled or burdened [Fdg. 30; R. Vol. I, 170].

Respondent Arden in reducing its prices was not actuated by any purpose, design or intent to prevent or destroy competition or to injure or destroy petitioner or

petitioner's business in the Los Angeles area or in interstate commerce [Fdg. 31; R. Vol. I, 170].

The prices charged by respondent Arden in any state where it did business were based on competitive conditions and its costs in the respective states [Fdg. 33; R. Vol. I, 171-172]. By reason of said competitive conditions and variations in cost existing in the respective states there was no reason for any similarity between the prices at which the respective ice cream products were sold in each of such states [Fdg. 34; R. Vol. I, 172].

Arden reduced its prices in good faith to meet the equally low prices of its competitors and in so doing was justified by reasonable business and economic considerations. [Fdg. 18; R. Vol. I, 163].

Any difference in the prices charged by Arden in different states did not substantially lessen competition or tend to create a monopoly in either state or where any such differential may have existed [Fdg. 45; R. Vol. I, 176-177].

Petitioner states that respondents defended upon three bases (Pet. p. 7, last par.). This is not a fair statement of the numerous defenses relied on nor an accurate statement of those mentioned as is shown by the findings hereinabove mentioned.

ARGUMENT.

I.

There Is No Special or Important Reason for the Granting of the Writ in the Instant Case.

Petitioner has failed to show any special or important reason why this Court should exercise its supervisory jurisdiction and grant the Writ herein. The decision of the Ninth Circuit is clearly in conformity with the decisions of this Court and other Circuits.

In support of its contention that the opinion of the Ninth Circuit is in conflict with the opinions of this Court and of certain Circuits, petitioner quotes certain portions thereof out of context and in some instances from widely separated paragraphs of that opinion, and in others only portions of sentences, without any analysis of the findings upon which that decision is based. Petitioner has also contended that the Ninth Circuit's opinion is in conflict with this Court's decision in *Moore v. Mead,* 348 U. S. 115 and in conflict with the decision in *Porto Rican American Tobacco Co. v. American Tobacco Co.* (2nd Cir.), 30 F. 2d 234, and as hereafter shown, has quoted from each of said opinions isolated portions thereof which completely fail to show the material underlying facts upon which said cases were decided.

Contrary to the contention of petitioner, as we shall demonstrate, the decision of the Ninth Circuit is not in conflict with the *Mead* case, or of the *Porto Rican Tobacco* case (Point II, *post*). There is not a single decision of any court which has held that a price reduction, under the circumstances found in the instant case, violates Section 2(a) of the Clayton Act. Similarly there is not a single decision which has held that mere differentials

in price alone in widely separated geographical areas constitute a price discrimination in violation of Section 2(a) of the Clayton Act as will be shown under Point III hereof.

Petitioner further asserts that the decision of the Ninth Circuit sweeps away essential parts of an important Antitrust Act (Secs. 2(a) and 2(b) of the Clayton Act) (Pet. p. 9). In this connection, petitioner claims that the basic and original purpose of Congress in enacting Section 2 of the original Clayton Act was to outlaw geographical price differentials (Pet. p. 9).

Petitioner's statement is not only an incorrect interpretation of the objects of said Statute, but it is clear from the legislative record which petitioner cites (Pet. p. 10) that Section 2 of the original Clayton Act was aimed at the evil of lowering prices in a particular locality for the *purpose of driving a rival out of business* while normal and higher prices were maintained in the rest of the country.[3] (S. R. 698, 63rd Cong. 2d Sess. 1, 43 (1914); H. R. 627, 63rd Cong. 2d Sess. 8 (1914).) In view of the clear purpose of Congress in enacting the Clayton Act, it is apparent that the decision of the Ninth Circuit is not in conflict with these basic purposes.

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[3]The committee on the judiciary in speaking of the objects of the proposed original Act, at page 8 of H. R. Rep., No. 627, 63rd Cong., 2d Sess. (1914), said:

> "Section 2 of the bill is intended to prevent unfair discriminations. It is expressly designed with the view of correcting and forbidding a common and widespread *unfair trade practice* whereby certain great corporations and also certain smaller concerns which seek to secure a monopoly in trade and commerce by aping the methods of the great corporations, *have heretofore endeavored to destroy competition and render unprofitable* the business of competitors by selling their goods, wares and merchandise at a less price in the particular communities where their rivals are engaged in business than at other places throughout the country." (Emphasis supplied.)

Petitioner quotes various isolated phrases of the Ninth Circuit's opinion (Pet. p. 10) and then claims that this demonstrates that the Court approved predatory price cutting which the Clayton Act outlawed. Not only does petitioner ignore the basic findings of fact in the instant cause, but the isolated phrases which it quotes are taken out of context and do not remotely suggest what petitioner claims. The context of that part of the Court's opinion referred to clearly shows that the Court was paraphrasing petitioner's own contentions. The Court then goes on to point out that the implication of petitioner's argument is that prices could never be lowered by a concern which does any interstate business in one area if it did not make a corresponding price cut in every other locality where it does business.

That the Ninth Circuit's opinion is not at variance with the basic principles of the Clayton Act appears from the following statement from its opinion which petitioner fails to mention.

> "It is perfectly true that the history of competition in the United States furnishes many instances where consolidated corporations or so-called trusts have dropped prices in order to eliminate the individual competitor, and there is no doubt that one of the legislative purposes in the Clayton Act and the Robinson-Patman Act was to meet such unlawful activity. *But this is not such a case.*" (Emphasis supplied.) [R. 2101.]

The price rigidity for which petitioner here contends is contrary to antitrust principles. This Court in its decision in *Automatic Canteen Co. of America v. Federal Trade Commission*, 346 U. S. 61, 63, 73-74, recognized

that price uniformity and rigidity is in open conflict with the purposes of antitrust legislation.[4]

Petitioner has made no showing of any special or important reason sufficient to justify this Court in granting a Writ.

II.

There Is No Conflict Between the Instant Case and Moore v. Mead's Fine Bread Co., 348 U. S. 115 or Porto Rican American Tobacco Co. v. American Tobacco Co. (2d Cir., 1929), 30 F. 2d 234.

As a ground for the granting of the Writ, petitioner claims that the decision of the Ninth Circuit is in direct conflict with the decision of this Court in *Moore v. Mead,* 348 U. S. 115 and *Porto Rican American Tobacco Co.* (2d Cir., 1929), 30 F. 2d 234.

Petitioner seeks to have the instant case decided, not on the particular facts disclosed by the Record, but on its erroneous assertion that the facts here are analogous to those in *Moore v. Mead,* and *Porto Rican American Tobacco Co.* cases.

In *Moore v. Mead* the jury found that Mead's Fine Bread Co. cut its price of bread locally to one-half of its former price, which was below its cost, for the express purpose and design of destroying and eliminating Moore as a competitor who was solely engaged in the manufacture and sale of bread locally. The Mead Company maintained its higher prices in interstate sales. The purpose

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[4]See: *Report of the Attorney Generals National Committee to Study The Anti-Trust Laws* (1955), pp. 131, 132.

and plan was successful, and the Moore Company was forced out of business. In that case this Court stated:

> "The destruction of a competitor was plainly established, as required by the amended §2(a) of the Clayton Act; and the evidence to support a finding of purpose to eliminate a competitor, as required by §3 of the Robinson-Patman Act, was ample." (348 U. S. 118.)

And further:

> "This type of price cutting was held to be 'foreign to any legitimate commercial competition' even prior to the Robinson-Patman Act. See Porto Rican American Tobacco Co. v. American Tobacco Co. (CA 2d NY) 30 F. 2d 234, 237. It seems plain to us that Congress went at least that far in the Robinson-Patman Act. As we have shown, the facts charged and found read upon the words of the statute." (348 U. S. 120.)

And, towards the close of its opinion, said:

> "It is, we think, clear that Congress by the Clayton Act and Robinson-Patman Act barred the use of interstate business to destroy local business, outlawing the price cutting employed by respondent." (348 U. S. 120.)

Petitioner quotes from *Moore v. Mead* (Pet. p. 13). The quotation is incomplete, being isolated phrases or sentences from an integrated paragraph. The first two sentences of the paragraph, which petitioner omits, show that the subject matter of the paragraph relates to "out-

lawed competitive practices" involved in that case. The first two sentences of said paragraph read as follows:

> "We think that the practices in the present case are also included within the scope of the antitrust laws. We have here an interstate industry increasing its domain through *outlawed competitive practices*". (Emphasis supplied.) (348 U. S. 119.)

The instant cause is not a case of the use of price cutting with the purpose and intent of eliminating a competitor or destroying competition, nor is it a case where interstate business was used to destroy local business through the medium of price cutting. It is not a case where the price differentials involved had any relation to or effect upon each other. Finally, it is not a case where the effect of such price differentials either substantially lessened or prevented competition with any person, or tended to monopoly.

It is obvious from an examination of the pertinent and controlling facts in each case that a conflict between the instant case and this Court's decision in the *Moore v. Mead* case simply does not exist.

The *Porto Rican Tobacco Co.* case (2d Cir., 1929), 30 F. 2d 234, cited by petitioner in its petition (p. 14) is likewise inapplicable. In that case the Porto Rican firm had failed to use its influence to oppose a local tax on cigarettes. To retaliate, the American Tobacco Co. lowered its prices in Porto Rico to approximately one-half of its price in the United States and at a heavy

loss to itself and the Porto Rican firms with the express design and plan of driving the Porto Rican firm out of business. This is shown by the language of the opinion of the Court from which we quote:

> "Appellant sent its export manager of its entire business to Porto Rico to wage the price war, and his admissions and business methods, there displayed, all prove the fact that it was intended to punish, and, if possible, eliminate, the appellee as a competitor. He directly proceeded to use strong, unfair competitive methods, and, from his own statements, designedly tried to cause loss to the appellee, a weaker competitor." (30 F. 2d 237.)

In that case all of the American cigarettes were manufactured and shipped into Porto Rico for sale. It further appears from the Court's opinion that the purpose of such discrimination was not in good faith to meet competition, but to effect by such discrimination, a substantial lessening of competition or to create a monopoly.

We submit that petitioner's attempt to parallel the present case with that of this Court's decision in *Moore v. Mead* and the decision in the *Porto Rican Tobacco Co.* case is completely without foundation.

III.

Petitioner's Criticism of the Opinion of the Ninth Circuit Is Clearly Without Merit.

Petitioner asserts that the opinion of the Ninth Circuit is erroneous for the following reasons: (a) the Court refused to recognize the alleged illegality of geographical price discrimination (Pet. p. 11), (b) the Court refused to recognize locally sustained injuries as protected by the Statute (Pet. p. 12) and (c) the Court imposed the false requirement that purchasers from the discriminator must compete with each other (Pet. p. 13).

In the succeeding subparagraphs of this Point III we shall show that each of the above contentions of petitioner is without merit.

A. The Sale of Goods in Widely Separated Geographical Markets at Different Prices in and of Itself Does Not Constitute Discrimination.

Petitioner claims that the Ninth Circuit was in extreme error when it failed to hold that respondent Arden was guilty of price discrimination in violation of Section 2(a) of the Clayton Act (Pet. p. 11). In support of such claim, petitioner has quoted an abstract statement of the Court (Pet. p. 11) without giving any consideration to the basis upon which the statement is predicated or the underlying premise of the Court.

A mere difference in price in widely separated geographical areas under the facts found in this case does not constitute price discrimination within the meaning of Section 2(a) of the Clayton Act. This is clear from the often

quoted definition of "price discrimination" by Congressman Utterback, Manager of the Conference Bill of the Robinson-Patman Act. The Congressman said at 80 Cong. Rec. 9416 (1936):

> "In its meaning as simple English a discrimination is more *than a mere difference.* Underlying the meaning of the word is the idea that some relationship exists between the parties to the discrimination which entitles them to equal treatment, whereby the difference granted to one casts some burden or disadvantage upon the other. If the two are competing in the resale of the goods concerned, that relationship exists. Where, also, the price to one is so low as to involve a sacrifice of some part of the seller's necessary *costs and profit* as applied to that business, it leaves that deficit inevitably to be made up in higher prices to his other customers; and there, too, a relationship may exist upon which to base the charge of discrimination. *But where no such relationship exists. where the goods are sold in different markets and the conditions affecting those markets set different price levels for them, the sale to different customers at those different prices would not constitute a discrimination within the meaning of this bill."*[5] (Emphasis supplied.)

Congressman Wright-Patman, the co-author of the Act, is fully in accord with these views. Of a series of questions and opinions set forth in his book, *The Robinson-*

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[5]This Court in the case of *F. T. C. v. Automatic Canteen Co. of America,* 346 U. S. 61, in discussing the phrase "discrimination in price" as used in Sections 2(a) and 2(b) of the Act in Footnote 10 of the opinion referred to the above statement of Congressman Utterback.

Patman Act (1938), pages 58-59, the following is most applicable:

> "QUESTION. Can I sell at different prices to different customers in different cities who are not in competition with each other?
>
> "OPINION. Yes, so long as the sale is not below cost. *There would be no discrimination within the application of the Act, unless a deliberate attempt were made* to destroy, or substantially lessen, competition in some locality, or in primary lines of commerce." (Emphasis supplied.)

Significantly, the unchallenged findings in this cause, are squarely within the criteria laid down for lawful price differentials by both Congressmen Utterback and Patman.

That mere difference in price in different areas is not a price discrimination is shown by a comparison of Section 2(a) of the Clayton Act and Section 3 of the Robinson-Patman Act. In Section 2(a) of the Clayton Act it is made unlawful for any person engaged in commerce and in the course of commerce "to discriminate in price between different purchasers." Section 3 of the Robinson-Patman Act provides it shall be unlawful for any person "to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said persons elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States." When dealing with sales of the same article in disconnected noncompetitive areas, Congress does not use the word "discriminate" but uses the appropriate words, "at prices lower than". Therefore, it is clear that sales at different prices in different areas are not in and of themselves a discrimination and are not illegal under Section 2(a) of the Act.

The theory advanced by petitioner would be in open conflict with basic antitrust policies and erect market barriers to efficient distribution. The opinion of the Ninth Circuit recognizes this when it specifically stated:

> "The implication of the arguments of plaintiffs is that prices can never be lowered by a concern, which does any interstate business, in one area if it fails to make a corresponding cut in every locality where it does business. This postulate need not be debated under the facts here. It may be said Congress did not put a floor under all existing prices so these could never be lowered by a firm doing intrastate business." [R. 2096.]

Indeed it is implicit in the foregoing observation of the Ninth Circuit that if petitioner's contention were adopted, an interstate company would be confronted with the dilemma of a nationwide price reduction regardless of competitive conditions, or no price reduction at all. If a nationwide price reduction were established, it might well destroy weaker concerns throughout the nation. The only other alternative would be for the interstate company to cease doing business locally. On the other hand, a strong, local concern could lower prices and force the interstate company out of the local market unless the latter could exist under a nationwide price reduction. If petitioner is correct, the antitrust laws would destroy rather than promote competition.

There is nothing in the Act which makes a price reduction in and of itself illegal. There is not a single case so holding. As stated in *General Shale Products Corporation v. Struck Const. Co.* (W. D. Ky., 1941), 37 F. Supp. 598, 603:

> "There is nothing in the Act which attempts to establish the price at which an article can be sold

to a purchaser; it merely provides that a seller cannot discriminate by selling it to one purchaser for less than he sells it to another purchaser who is in competition. Accordingly, a sale at a reduced price *is not illegal unless it is made for the purpose of discriminating between competitive buyers.*" (Emphasis supplied.)

Cf. Schine Theatres, Inc. v. United States, 334 U. S. 110, 120-121.

Assuredly the decision of the Ninth Circuit recognized and followed the applicable principles of antitrust law.

B. The Ninth Circuit Did Not Hold That Locally Sustained Injuries Were Not Protected by Section 2(a) of the Clayton Act.

Petitioner asserts that the Ninth Circuit held that locally sustained injuries were not protected by Section 2(a) of the Clayton Act. In reliance thereon, petitioner quotes (Pet. p. 12) from small isolated portions of a lengthy paragraph of the opinion which in no way supports its contention, and in which the court does not even discuss the point asserted by petitioner.

The opinion of the Ninth Circuit specifically recognizes that local merchants are protected by the antitrust laws as announced in the case of *Moore v. Meade.* The Ninth Circuit stated:

> "Arden did not embark upon a campaign by selling goods shipped in interstate commerce at a loss in a local area to punish or designedly try to cause loss to one weaker competitor." [R. 2098.]

This is also clearly shown from the concluding paragraph of the Ninth Circuit's opinion which we have heretofore quoted under Point I herein.

C. The Ninth Circuit Imposed No Requirements That Purchasers From an Alleged Discriminator Must Compete With Each Other.

Petitioner's additional contention of "extreme" error of the Ninth Circuit's decision is that it imposed a requirement that purchasers from an alleged discriminator must compete with each other before there can be a violation of Section 2(a) of the Clayton Act (Pet. p. 13). Such contention completely distorts the opinion of that Court.

In the first place, as we have previously pointed out, the Court found that there was no price discrimination within the meaning of the Act because of the findings of fact expressly negativing the existence of such price discrimination and affirmatively showing the justification for the price differentials. Then, the Ninth Circuit [R. 2098] in answer to petitioner's contention that *F. T. C. v. Morton Salt,* 334 U. S. 37 applied, distinguished that case on the basis that it involved differentials between competing purchasers of the same seller. Nowhere in the opinion is there a statement, either by inference or otherwise, that in order to establish price discrimination within the meaning of the Act there must be sales at different prices to purchasers who compete directly with each other.

The statements of the Ninth Circuit from which petitioner quotes (Pet. p. 13), are taken out of context; the two statements are from different paragraphs and refer to different subject matters. The first statement [R. 2097] appears in a paragraph relating generally to the Court's findings, the second [R. 2098], some four paragraphs subsequent to the first, in a paragraph distinguishing *F. T. C. v. Morton Salt Co.,* 334 U. S. 37. By no stretch of imagination do the context of these paragraphs

indicate that the Court imposed a requirement that the differentials must be to competing purchasers in order to establish violation of the Clayton Act.

Every essential element in proof of a *prima facie* violation of Section 2(a) of the Clayton Act is absent in this case. Indeed, the findings establish there were no price discrminations and none of the statutory requisites of injury to competition.

IV.

The Court of Appeals Did Not Base Its Decision in Part Upon a Nonexistent Finding.

The third ground urged by petitioner why the writ should be granted is, that the Ninth Circuit "based its decision in part upon a nonexistent finding as to the likelihood of competitive injury" (Pet. p. 15). Petitioner states that the Ninth Circuit asserts that the District Court found "there was no possibility that competition might have been lessened," and petitioner then states that the District Court made no such finding.

A reading of the whole paragraph of the opinion containing the language quoted by petitioner shows such contention is erroneous.[6] The Ninth Circuit used the word "findings," plural, not the word "finding," singular, indicating that it was referring to all of the findings of the District Court when it stated that the findings expressly

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[6]The paragraph of the opinion referred to reads as follows:

"The difference in price between various states did not substantially lessen competition or tend to create a monopoly in ice cream products. There was no evidence that trade or commerce, interstate or otherwise, was lessened or burdened by any action of defendants in this case. The findings of the trial court expressly negativing the existence of any such consequences or a possibility of such results were supported by substantial evidence." [R. 2099.]

negative the possibility that the price differentials "substantially lessened competition or tended to create a monopoly in ice cream products." And, without question, all the findings considered as a whole so indicate.

It is undisputed that the price reduction complained of terminated on January 13, 1951, prior to the trial of this action [R. 2095]. Consequently, the District Court was in a position to determine with finality whether the price differentials did or did not at any time during the price reduction substantially lessen competition or tend to create a monopoly, and it found in the negative [Fdg. 45; R. Vol. I, 177].

Petitioner relies on the following three Federal Trade Commission cases as showing the necessity for a finding of "reasonable possibility":

Corn Products Ref. Co. v. F. T. C., 324 U. S. 726;

F. T. C. v. Morton Salt Co., 334 U. S. 37;

Exposition Photograph Products, Inc. v. F. T. C., 217 F. 2d 821.

In all of said cases the practices claimed to violate the Clayton Act were being followed at the time of the order of the Federal Trade Commission and every indication was that such practices would continue to be followed in the future. The continuance of such practices made necessary a determination as to whether or not *in the future* there was a reasonable possibility that such practices would substantially lessen competition, since Section 2(a) of the Clayton Act uses the words "where the effect of such discrimination *may be* substantially to lessen competition." As the court said in the *Morton Salt* case, "such findings are to form the basis for cease and desist orders" (334 U. S. 54).

V.

Respondents' Defense of Meeting Competition Was Proven Although the Price Reduction Was General Throughout the Local Area.

The fourth ground urged by the petitioner why the writ should be granted is, that the defense of respondents of "meeting competition" was not proven since respondent Arden by reducing prices in the whole Los Angeles area, did not meet individual prices of competitors (Pet. pp. 17-18).

This defense was only one of a number of defenses urged by respondents and found to be established by the District Court. Therefore, if any burden rested on respondents to meet a *prima facie* case (assuming that one was shown) respondents completely met that burden as disclosed by the findings and the decision of the Ninth Circuit.

There is nothing in Section 2(b) of the Clayton Act which provides that the defense of meeting competition is only proven if prices are reduced to meet an individual, equally low price, and petitioner has cited no case so holding. To deprive respondent Arden of the right to reduce prices to all customers in a local area would be depriving it of the essence of competition. Respondent Arden's general price reduction of certain of its ice cream products in the Los Angeles area was necessary in order to eliminate a great many abuses found by the Court to exist in said area [Fdg. 7; R. Vol. I, 155-156]. The Ninth Circuit stated that this was "one of the necessities of competition" [R. 2096].

Petitioner has shown no reason why respondent Arden in establishing its defense of "meeting competition" could

not give the benefit of the price reduction to all customers within the Los Angeles area rather than to a number only who had been quoted equally low prices by Arden's competitors, including petitioner.

VI.

Respondents' Defense of Meeting Competition Was Proved by Proper Evidence.

The fifth ground urged by petitioner why the writ should be granted is, that the defense of "meeting competition" was not proved since respondents (a) undercut the lower prices of competitors, (b) did not show the quality of the products of competitors, nor (c) show the quantity of sales by competitors (Pet. pp. 20-23).

In support of its first contention petitioner refers to a statement in the opinion of the Ninth Circuit that Arden would not have violated the statute even if it had placed the price lower than any competitor (Pet. p. 21). A reading of the opinion indicates that the court's statement relied on by petitioner had reference to whether or not petitioner had made out a *prima facie* case and was not directed to the respondents' defense of "meeting competition" which appears in the latter part of the opinion [R. 2099-2100]. In any event, it is to be noted that the Ninth Circuit did not say the respondent Arden had placed the price lower than any competitor's price. In fact the District Court found that respondent Arden did not undercut the lower prices of competitors.[7] Said find-

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[7]The prices established by Arden in the Los Angeles area and in other areas of the State of California on said date (November 21, 1949) were not lower than prices at wholesale of its competitors on or before November 19, 1949, for ice cream products of like grade, quality and quantity in the Los Angeles area and other areas in the State of California [Fdg. 16; R. Vol. I, 162].

ing is not challenged by petitioner and, consequently, is a complete answer to petitioner's first contention. There is obviously no conflict between the decision of this court in the case of *Standard Oil Co. v. F. T. C.*, 340 U. S. 231, and the decision of the Ninth Circuit in the case at bar as claimed by petitioner (Pet. pp. 20-21) in view of the difference in the findings in each case.

Petitioner's second contention is, that the defense of "meeting competition" was not proved by reason of the fact that respondents failed to introduce evidence of the quality of the product of the competitor (Pet. p. 21). Petitioner quotes from the opinion of the Ninth Circuit to the effect that the finding of the District Court that Arden had actually acted in good faith to meet the low prices of some of its competitors was not destroyed because it failed to introduce evidence of the quality of the product of the competitor [R. 2095]. The Ninth Circuit, in the portion of the opinion referred to, was referring to the case made by the petitioner and not to respondents' defense of "meeting competition."

There is no question but what the products of respondent Arden involved in the price reduction and the products of its competitors which it is claimed to have met were closely related and in competition with each other.

The District Court found that the reduced prices of respondent was not lower than prices of its competitors for ice cream products of *like quality* [Fdg. 16; R. Vol. I, 162]. Petitioner does not challenge this finding.

In view of the unchallenged findings in this case as above stated, there is no conflict between the decision of the Ninth Circuit in the case at bar and the decision in *Standard Oil Co. v. F. T. C.*, 340 U. S. 231, or *Porto*

Rican Tobacco Co. v. American Tobacco Co., 30 F. 2d 234, as claimed by petitioner.

Petitioner's third contention is, that the defense of "meeting competition" was not proved because respondent Arden allegedly did not show that its equally low price was for the same quantity of goods as offered by competitors at the same price (Pet. pp. 20-23). Petitioner again refers to the statement of the Ninth Circuit to the effect that the finding of the trial court that Arden had actually acted in good faith to meet the equally low price of its competitors was not destroyed because it failed to introduce evidence of the quantity of the sales of the competitor (Pet. p. 23). Clearly, the Ninth Circuit was here referring to the case made by the petitioner rather than the defense of "meeting competition." The District Court found that the prices established by respondent Arden were not lower than the prices of its competitors for ice cream products of like grade, quality and quantity in the Los Angeles area and other areas in the State of California [Fdg. 16; R. Vol. I, 161-162]. This finding is not challenged by petitioner. Petitioner's contention is without merit.

Conclusion.

We submit that petitioner has failed to state any special or important reasons why a writ of certiorari should be granted in this case. Accordingly, the petition should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1955
No. 672

THE BALIAN ICE CREAM CO., INC., a corporation; F. AND A. ICE CREAM CO., a corporation; COLONIAL ICE CREAM CO., INC., a corporation, *et al.*,

Petitioners,

vs.

ARDEN FARMS CO., a corporation, *et al.*,

Respondents.

Petition for Rehearing of Order Denying Petition for Writ of Certiorari.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners in these fifteen cases of geographical price discrimination under the antitrust laws pray that this Court grant rehearing of its order of March 26, 1956, denying the petition for writ of certiorari, that said order be vacated, and that a writ of certiorari issue to review the judgments of the Court of Appeals for the Ninth Circuit as prayed for in the petition filed February 8, 1956, herein.

Preliminary Statement.

Novel and compelling grounds for review, not previously presented herein, are presented in this petition. Section 2 of the amended Clayton Act is in jeopardy.

This is an aggravated and extreme case of geographical price discrimination. This is true because the re-

spondents in the Los Angeles area imposed much lower prices than elsewhere, yet their cost base in Los Angeles admittedly was much higher than elsewhere. [R. 706-707, 1443, 1459, 1462.] This is uncontradicted. Thus, on the basis of costs, respondents should have maintained higher—not lower—prices in Los Angeles than in other areas. Indeed, respondents have never made any attempt to justify their local price discrimination on the ground of lower costs. Nevertheless, an incorrect impression to the contrary may have been left with this Court. (Resp. Br. p. 7.) Actually, the only separate defense raised was a claim of good faith meeting of a competitor's equally low price.

This is not a case where the findings preclude recovery under Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. (49 Stat. 1526, 15 U. S. C. §13[a].) Correct application of statutory law compels reversal, whether or not any finding is accepted or rejected. Only questions of law are presented for decision. These are the novel and compelling questions which follow—which will plague the courts for years to come, unless, at this opportunity, the Ninth Circuit's rulings in direct contravention of federal statute are overturned by this Court.

Reasons for Granting Rehearing and Issuing the Writ.

1. The Court of Appeals for the Ninth Circuit has written into the statute the new element of purpose to destroy competition. This is directly contrary to Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. (49 Stat. 1526, 15 U. S. C. §13[a].)

The requirement of purpose is nowhere to be found in the Clayton Act. More important, it was deliberately eliminated from the original House bill in 1914. The Senate *struck out* the following words so pertinent here:

> ". . . with the purpose . . . thereby to destroy or wrongfully injure the business of a competitor." (Sen. Doc. No. 584, 63d Cong. 2d Sess. [1914] 4.)

Thus the element of purpose was forever stricken out of Section 2 of the Clayton Act and its amended, Robinson-Patman, form.

How, then, is it possible for the Court of Appeals to hold to the contrary as it does in the concluding paragraph of its opinion? In this key paragraph the Ninth Circuit reveals the basic and underlying thesis of its decision. The Court of Appeals states:

> "It is perfectly true that the history of competition in the United States furnishes many instances where consolidated corporations or so-called trusts have dropped prices *in order to eliminate the individual competitor,* and there is no doubt that one of the legislative purposes in the Clayton Act and the Robinson-Patman Act was to meet such unlawful activity. But this is not such a case." [R. 2101, Appx. A, p. 24; italics added.]

The Ninth Circuit thus holds two elements necessary for violation of the statute. The respondents admit that they "dropped prices," and thus one of the two requirements named is present. The fundamental basis of the decision is, therefore, the absence of the other named requirement, *i. e.,* purpose to eliminate a competitor.

Manifestly, the Ninth Circuit is saying that there is no violation of the statute unless it is shown that the discriminator imposed the price cut *"in order to eliminate the individual competitor . . ."* The words "in order to" can only mean "for the purpose of." (*Webster's New International Dictionary,* 2d ed., unabridged, p. 1716.) Thus the Court of Appeals has firmly said that there is

a requirement of purpose to eliminate a competitor. That Court has ruled that purpose is a significant element under Section 2(a) of the amended Clayton Act.

Respondents themselves have emphasized, in argument directed to this very Court, that "the *purpose* of driving a rival out of business" is an important requirement of the statute, and they refer specifically to the above quoted concluding paragraph of the Ninth Circuit's opinion. (Resp. Br. pp. 9-10; italics added.) It is obvious from this time forward that the same argument will be advanced in all courts. All price discriminators will point to the Ninth Circuit's decision as strong authority for this specious proposition. In the vast Ninth Circuit at the very least, in the absence of a Supreme Court decision, there is no longer any such thing as price discrimination unless it is proved that the discriminator was motivated by the purpose to eliminate a competitor, or as the respondents in the case at bar put it, by "the purpose of driving a rival out of business."

The statute itself supplies the answer. The pertinent parts of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, are:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce . . ." (49 Stat. 1526, 15 U. S. C. §13[a].)

There is no requirement of purpose here or any other place in the Act. But now, forty-two years after the passage of the Clayton Act, the Ninth Circuit suddenly rules that purpose to eliminate a competitor is an essential element. It has erected a phantom statute within which all business men seeking the protection of Section

2 of the amended Clayton Act must bring their cases or fail. The reading into the statute of this foreign requirement is the clearest kind of judicial legislation.

Every day throughout the nation business transactions take place which are affected by the Ninth Circuit's decision. Yet it is utterly impossible at this writing to advise the owner of any business, large or small, what the law really is. On the one hand stands the plain language of the statute, and on the other stands the contrary decision of the Court of Appeals which will probably control the action taken in most courts. By the same token, the Federal Trade Commission can scarcely be expected to proceed under this statute when it is suddenly told by the Ninth Circuit that purpose has now become an essential element of proof.

It is indeed urgent that this Court accept review of this antitrust case in order to preserve the vitality of this important statute which has been saddled with a foreign element bound to destroy the effectiveness of the Act passed by Congress.

Unless the decision of the Ninth Circuit is corrected now, years of litigation in the various circuits will be required before the statute finally is declared to stand without the element of purpose. Until the statute is restored as enacted by Congress, there can only be wasteful confusion on a nationwide scale.

2. The Ninth Circuit has expanded the so-called "good faith" defense to sanction the meeting of unlawful prices of others. Beyond that, the Court of Appeals has made the further ruling that discriminators, under the guise of meeting competition, may adopt such unlawful prices and then extend them to cover an entire geographical area. Thus the decision of the Court of Appeals is directly contrary to Section 2(b) of the Clayton Act, as amended by the Robinson-Patman Act. (49 Stat. 1526, 15 U. S. C. §13[b].)

This incongruous ruling is squarely in conflict with the uniform decisions of this Court. In *F. T. C. v. Staley Mfg. Co.*, 324 U. S. 746, 754, 65 S. Ct. 971, 89 L. Ed. 1338, 1344 (1945), this Court specifically stated:

> ". . . the clear Congressional purpose [was] *not* to sanction by §2(b) the *excuse* that a person charged with violation of the law was merely adopting a similarly *unlawful* practice of another." (Italics added.)

The uncontradicted record establishes that respondent Arden definitely knew that the few price deviations it was claiming to meet were themselves unlawful prices. [R. 1562; Ex. AQ.] It is doubly plain that Congress did not intend Section 2(b) of the Act to be available as a defense under such circumstances. Without question the "good faith" defense is not available when the discriminator admittedly recognizes the illegality of the prices it claims to be meeting. It is axiomatic that a discriminator can never claim to be meeting "in good faith . . . an equally low price of a competitor" where it recognizes the unlawfulness of such prices. (49 Stat. 1526, 15 U. S. C. §13[b].)

Nevertheless, the opinion of the Court of Appeals throws out any requirement of lawfulness and permits resort to the "good faith" defense even with knowledge of illegality on the part of the discriminator. In major contradiction of the statute, the Ninth Circuit states:

> "It was not incumbent upon Arden to establish . . . the lawfulness of the prices which it claimed to meet." [R, 2095, Appx. A, p. 17.]

Contrariwise, in *Standard Oil Co. v. F. T. C.*, 340 U. S. 231, 71 S. Ct. 240, 95 L. Ed. 239 (1951), this Court emphasized the importance of a showing of the lawfulness of all prices which discriminators claim to be meeting under the "good faith" defense. In that decision this

Court clearly said that a discriminator cannot claim protection under Section 2(b) of the amended Clayton Act unless the competitor's lower price "is a *lawful individual* price." (340 U. S. at 244, 95 L. Ed. at 248; italics added.) And this Court further stated that the statute recognizes meeting only "a *lawful* and equally low price of a competitor." (340 U. S. at 246, 95 L. Ed. at 249; italics added.)

The sharp and direct conflict between the Ninth Circuit and the leading decisions of this Court is self-evident. But the decision of the Ninth Circuit goes much farther even than such head-on conflict.

For the first time the Court of Appeals condones the spreading of an unlawful price pattern over an entire community. This greatly magnifies the discrimination which is unlawful even in *individual* instances. In *F. T. C. v. Staley Mfg. Co.*, 324 U. S. 746, 754, 65 S. Ct. 971, 89 L. Ed. 1338, 1344 (1945), this Court held that the discriminator could not resort to the "good faith" defense since it had "adopted a similarly unlawful practice of another." But, despite this clear statutory law, the Ninth Circuit sanctions the submerging of an entire area under such unlawful prices upon claim of the "good faith" defense. As a matter of law, this is not "good faith" by any standard, especially by the statutory standard established by Congress. Blanketing a whole geographical area with a drastic price cut—with unlawful prices—is a most flagrant and inexcusable discrimination under the Clayton Act. This is the precise retaliatory discrimination which the Ninth Circuit holds exempt from the statute.

There are both federal and state laws to take care of any individual prices of competitors which are illegally low. If any seller, such as respondent Arden, is really concerned about these matters, direct action against unlawful prices may be taken under these laws. And

it is basic to antitrust law that no seller has any right to take matters into its own hands, make an area-wide price cut, and then attempt to seek refuge in the "good faith" defense under Section 2(b) of the Clayton Act. (*F. T. C. v. Staley Mfg. Co.*, 324 U. S. 746, 65 S. Ct. 971, 89 L. Ed. 1338 (1945); *Standard Oil Co. v. F. T. C.*, 340 U. S. 231, 71 S. Ct. 240, 95 L. Ed. 239 (1951); *Moore v. Mead's Fine Bread Co.*, 348 U. S. 115, 75 S. Ct. 148, 99 L. Ed. 145 (1954).)

In *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211, 214, 71 S. Ct. 259, 95 L. Ed. 219, 224 (1951), this Court states the controlling principle in these words:

> "If petitioner and others were guilty of infractions of the antitrust laws, they could be held responsible in appropriate proceedings brought against them by the Government or by injured private persons. The alleged illegal conduct of petitioner, however, could not legalize the unlawful combination by respondents nor immunize them against liability to those they injured."

Under the Ninth Circuit's opinion the "good faith" defense is now stretched to the point where a discriminator may legally cover any geographical area with prices heretofore held by this Court to be unlawful and hence not protected by the "good faith" defense.

Now, according to the Ninth Circuit, a discriminator may imitate any unlawful, individual, lower price it finds in a community. On the basis of such unlawful lower price, any discriminator is now free to subject an entire area to a drastic price cut in direct violation of the statute specifically enacted to prevent such abuses. This fundamental national policy against local price discrimination is established by the Clayton Act. That policy is safeguarded only so long as use of the "good faith" defense

cannot go beyond the "lawful individual price." (*Standard Oil Co. v. F. T. C.*, 340 U. S. 231, 71 S. Ct. 240, 95 L. Ed. 239 (1951).)

By its action the Ninth Circuit has scuttled sound policy carefully embodied in statutory law. A general license has been issued for price discrimination, for this dangerous decision expands the "good faith" defense to the point where it protects price discrimination in general.

If the Court of Appeals' opinion stands as law, eventually it will be recognized that Section 2 of the amended Clayton Act has, in the vast majority of cases, been erased from the books.

Summary and Conclusion.

If the decision of the Court of Appeals is allowed to stand without review, it will introduce into Section 2 of the amended Clayton Act the following elements directly contrary to the statute and the decisions of this Court:

(a) The requirement of purpose. This false requirement, nowhere to be found in the statute, will have been written into the Act. It will be necessary for the injured party to show that the discriminator was motivated by the purpose to eliminate a competitor, or as respondents put it, by "the purpose of driving a rival out of business."

(b) License to meet unlawful prices of others. On the basis of a few unlawful prices of others, the discriminator can always obtain complete immunity for its otherwise illegal price discrimination upon assertion of the "good faith" defense. This is directly contrary to *Standard Oil Co. v. F. T. C.*, 340 U. S. 231, 71 S. Ct. 240, 95 L. Ed. 239 (1951), and *F. T. C. v. Staley Mfg. Co.*, 324 U. S. 746, 65 S. Ct. 971, 89 L. Ed. 1338 (1945).

(c) The requirement of direct causal connection between the discriminator's prices in different geographical areas and the injury sustained. This false requirement, nowhere to be found in the statute, that injury sustained locally from the impact of area price cutting is not subject to relief, will have been written into the Act. This is directly contrary to *Moore v. Mead's Fine Bread Co.*, 348 U. S. 115, 75 S. Ct. 148, 99 L. Ed. 145 (1954).

(d) The requirement of competing purchasers in a geographical price discrimination case. This false requirement, nowhere to be found in the statute, that purchasers at the point of the price cut have to be in competition with purchasers in other states or areas, will have been written into the Act. This is directly contrary to *Moore v. Mead's Fine Bread Co.*, 348 U. S. 115, 75 S. Ct. 148, 99 L. Ed. 145 (1954).

(e) License to cover an entire area with a discriminatory price cut. Upon the basis of an insignificant number of lower prices of others, an interstate discriminator is given license to single out a local area and to impose a price cut over that entire area. This destroys the statutory rule that a seller may claim to meet competition only in individual instances as they arise—instance by instance. This is directly contrary to *F. T. C. v. Staley Mfg. Co.*, 324 U. S. 746, 65 S. Ct. 971, 89 L. Ed. 1338 (1945).

(f) License to undercut. The discriminator is given license to undercut other sellers and still claim as a defense that it met an "equally low price of a competitor." This destroys the clear law against undercutting. This is directly contrary to *Standard Oil Co. v. F. T. C.*, 340 U. S. 231, 71 S. Ct. 240, 95 L. Ed. 239 (1951).

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Ninth Circuit.

April 18, 1956.

Respectfully submitted,

GORDON F. HAMPTON,
Counsel for Petitioners.

JAMES C. SHEPPARD and
RICHARD B. HOEGH,
Of Counsel.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58(2) of the Rules of this Court.

GORDON F. HAMPTON,
Counsel for Petitioners.

FILED
FEB 8 1956
HAROLD B. WILLEY, C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 672

THE BALIAN ICE CREAM CO., INC., a corporation, F & A. ICE CREAM CO., a corporation, COLONIAL ICE CREAM CO., INC., a corporation, et al.,

Petitioners,

vs.

ARDEN FARMS CO., a corporation, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

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SUPREME COURT OF THE UNITED STATES

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No.

THE BALIAN ICE CREAM CO., INC., a corporation, F & A. ICE CREAM CO., a corporation, COLONIAL ICE CREAM CO., INC., a corporation, et al.,

Petitioners,

vs.

ARDEN FARMS CO., a corporation, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Dee C. Blythe and Lynell G. Skarda move this Court for leave to file a brief in this case as amicus curiae in support of the petition for writ of certiorari. The consent of the attorneys for the petitioners herein has been obtained, but the attorneys for the respondents herein refused to consent to the filing of a brief by movants as amicus curiae.

The movants, Dee C. Blythe and Lynell G. Skarda, have no financial interest in this case, but they were counsel for petitioner in Moore v. Mead's Fine Bread Co., 348 U.S. 115, 75 S. Ct. 148, 99 L. Ed 123 (Adv.), and now have pending in the District Court of the United States for the Western District of Texas, Pecos Division, Cause No. 2182, styled R. B. Baker, Plaintiff, v. Gulf Oil Corporation, a corporation, Humble Oil & Refining Company, a corporation, Standard Oil Company of Texas, a corporation, Magnolia Petroleum Company, a corporation, Sinclair Refining Company, a corporation, Shell Oil Company, a corporation, Phillips Petroleum Company, a corporaton, Continental Oil Company, a corporation, The Texas Company, a corporation, and the Cosden Petroleum Corporation, a corporation, defendants, in which most of the points involved are the same as those presented for decision in the instant case, that is:

(1) Price differentials by a corporation or combination engaged in interstate commerce are per se illegal as a price discrimination under Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, and neither time, custom, practice, nor the trial court's idea of fairness can be substituted for proof by the discriminator of actual and factual justification in good faith.

(2) Neither an actual burden on interstate commerce, nor a causal connection between prices in different states, nor a purpose or intent to monopolize, nor an actual destruction or elimination of a competitor is necessary to show a violation of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, for Congress under

its plenary powers over interstate commerce already has determined that mere injury to a local competitor encourages and fosters monopoly, and, thus, should be prohibited.

(3) A corporation or combination engaged in interstate commerce cannot use a blanket price cut which is prohibited by and not justified under the Robinson-Patman Act to police or punish its competitors or to hold, gain, or regain what it considers its fair share of the market.

(4) Even if it be assumed that a corporation or combination engaged in interstate commerce can lawfully discriminate in meeting the individual equally low price of either a local or an interstate competitor, the discriminator cannot do so by using a geographical blanket price cut, and in any event it has the burden of showing that the price met was lawful and on products of equal grade, quality, and quantity.

The brief of the petitioners herein in the Court of Appeals for the Ninth Circuit argues only a portion of the aforementioned points, and the discussion therein of those argued is inadequate in view of the intervening decision of this Court in Moore v. Mead's Fine Bread Co., supra, which reversed the opinion of the Court of Appeals for the Tenth Circuit, 208 F. 2d 777, which opinion and all of its concomitant errors were adopted by the Ninth Circuit in the instant case. And further for the reason that movants by reason of their familiarity with the facts in Moore v. Mead's Fine Bread Co., supra, can more adequately treat the legal principles of that case in their application to the instant case. And still further for the reason

that the opinion of the Ninth Circuit in the instant case emasculates and renders ineffective the important decision of this Court in Moore v. Mead's Fine Bread Co., supra, in which movants believe they best can and should defend. And finally for the reason that pending litigation in Baker v. Gulf Oil Corporation, et al., supra, in which movants are counsel for plaintiff, raises some of the identical points, and the erroneous decision of the Ninth Circuit in the instant case endangers a proper trial and decision of that cause which has a fact situation that has already become a subject of concern and intensive investigation by the Congress. See Gasoline Price War in New Jersey, Hearings before a Subcommittee of the Select Committee on Small Business, Part 2, 10/19-20/55, United States Senate, 84th Congress, 1st Sess., 1955; Petroleum Marketing Practices, Hearings before the Select Committee on Small Business, Seattle, Wash., 11/16-17/53, United States Senate, 83rd Congress, 1st Sess., 1953. Movants have no reason to believe that the arguments on the above questions will be expanded properly and be made complete in this Court. If these questions are approved by this Court, the decision of the court below must be reversed.

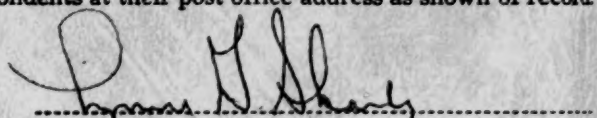
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CERTIFICATE OF SERVICE

I, Lynell G. Skarda, do hereby certify that a copy of the foregoing Motion was mailed on January 27th, 1956, by depositing the same in a United States Post Office with air mail postage prepaid, addressed to counsel of record for petitioners and respondents at their post office address as shown of record.



Lynell G. Skarda
P. O. Box 390, Clovis, New Mexico.

FEB 13 1956
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

October Term, 1955.

No. 672

THE BALIAN ICE CREAM CO., INC., a corporation, F. AND A. ICE CREAM CO., a corporation, COLONIAL ICE CREAM CO., INC., a corporation, *et al.*,

Petitioners,

vs.

ARDEN FARMS CO., a corporation, *et al.*,

Respondents.

Respondents' Objections to Motion for Leave to File Brief as Amicus Curiae in Support of Petition for Writ of Certiorari.

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THE BALIAN ICE CREAM CO., INC., a corporation, F. AND A. ICE CREAM CO., a corporation, COLONIAL ICE CREAM CO., INC., a corporation, *et al.*,

Petitioners,

vs.

ARDEN FARMS CO., a corporation, *et al.*,

Respondents.

Respondents' Objections to Motion for Leave to File Brief as Amicus Curiae in Support of Petition for Writ of Certiorari.

Respondents object to Movant's motion for leave to file *amicus curiae* brief in the above-entitled matter and refuse to consent to the filing of such a brief for the reasons hereinafter set forth.

1. **Movants' Contention That Moore v. Mead's Fine Bread Company, 348 U. S. 115, Applies Here Is Wholly Erroneous as That Case Is Factually Dissimilar From the Instant Cause.**

All of the basic facts involved in the instant case together with the pertinent findings of fact of the trial court below are set forth in the extensive opinion of the United States Court of Appeals for the Ninth Circuit not

yet officially reported but found in the Record at pages 2080-2101 inclusive. Every material and ultimate fact was decided and found by the trial court in favor of defendants. On appeal, the United States Court of Appeals for the Ninth Circuit found the Court's findings were amply supported by the evidence and that the findings supported the judgment in each cause and affirmed the judgment of the court below. This case, therefore, "must be governed by the well-settled rule in this Court that, when two courts have reached the same conclusion on a question of fact, their findings will not be disturbed unless it is clear that their conclusion was erroneous."

Baker v. Schofield, 243 U. S. 114, 118;

Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co., 336 U. S. 271, 275.

Cf. Fed. R. Civ. P. 52(a).

Manifestly the instant cause is factually dissimilar from *Moore v. Mead's Fine Bread Company,* 348 U. S. 115, which involved the use of price-cutting as a monopoly weapon to eliminate a competitor. In that case the defendant had engaged in predatory price-cutting activities with the intent, purpose and result of driving plaintiff out of business. After a re-trial, judgment was entered by the District Court awarding treble damages in favor of the plaintiff after a jury trial. The United States Court of Appeals for the Tenth Circuit reversed. This court, in upholding the District Court's award of damages to the plaintiff, held that the use of price-cutting activities of a monopolistic weapon with the intent, purpose and result of eliminating competitors violated the Clayton Act and the Robinson-Patman Act. This Court

in that case merely reiterated the established principle of law which bars the use of interstate business to destroy local business through the medium of price-cutting activities done for that purpose.

However, the foregoing principle is not applicable here as the uncontroverted findings of the Trial Court amongst others in this cause are: That the price reduction of Respondents was not made for the purpose of destroying competition or eliminating any competitor [Fdg. 31, Record Vol. I, 170]; that the prices of Respondents in the Los Angeles area and in other competitive areas were fair and reasonable and determined by competitive conditions in the respective areas and that there was no substantial lessening of competition or prevention of competition with any of the persons referred to in Section 2(a) of the Clayton Act [Fdgs. 29, 33, 45; Record Vol. I, 169, 171, 176]; that by reason of competitive conditions and variations in cost existing in the respective states in which Respondent Arden did business, there was no reason for any similarity between the prices at which its respective ice cream products were sold in each of the said states [Fdg. 34; Record Vol. I, 172]; and that the prices established by each Respondent and the sales of ice cream products at such prices were made in good faith to meet the lawful and equally low prices of its competitors [Fdg. 18; Record Vol. I, 163]. Moreover, in the instant cause each of the plaintiffs continued in business except plaintiff Bressler who sold its business to a third party for reasons not concerned here [Record Vol. III, 953] and their combined volume remained constant during the period involved [Fdg. 13; Record Vol. I, 160].

In view of the clear findings of the District Court concurred in by the Court of Appeals, it is evident that *Moore v. Mead's Fine Bread Company,* 348 U. S. 115, has no application whatsoever.

2. The Record in This Cause Demonstrates That All the Basic Issues Were Adequately Presented by the Parties and Movants Have Shown No Reason for Asserting Otherwise.

Movants further argue that they can more adequately present to this Court the principles of law involved in the instant cause notwithstanding their obvious and demonstrated unfamiliarity with the Record and facts and further notwithstanding that the same attorneys who tried the case before Judge Yankwich, filed, briefed and argued the appeal and petition for rehearing before the United States Court of Appeals for the Ninth Circuit. In this connection, Movants purport to list four abstract points of law which they claim were inadequately argued before the Ninth Circuit. These purported points of law are in fact not questions but statements of what Movants think the law ought to be. The first three are not relevant to the disposition of the case in view of the findings of the District Court and the fourth is contradictory to the findings of that court. Moreover, Movants have failed to set forth the relevancy of such proposed points of law to the disposition of the case as required by Subdivision 3 of Rule 42 of this court.

In any event, substantially all of these alleged points of law were in substance exhaustively argued in petitioner's opening brief on appeal and their brief in support of their petition for rehearing before the Ninth

Circuit. In particular, the case of *Moore v. Mead's Fine Bread Company,* 348 U. S. 115, was mentioned innumerable times in the petition for rehearing before that Court and any inference in Movants' motion that the Ninth Circuit did not consider this Court's decision in *Moore v. Mead's Fine Bread Company,* 348 U. S. 115, is completely erroneous. We submit that Movants' argument in the face of the record in this cause is wholly without merit.

3. The Contention That the Decision of the U. S. Court of Appeals for the Ninth Circuit Endangers a Proper Trial and Decision of the Case of Baker v. Gulf Oil Co., Is Without Merit.

Movants contend that the decision of the United States Court of Appeals for the Ninth Circuit endangers a proper trial and decision in the case of *Baker v. Gulf Oil Company,* now pending in the United States District Court for the Western District of Texas, Pecos Division, Cause No. 2182, in which they are counsel, as that case allegedly raises some of the identical points presented in the Ninth Circuit's decision herein. Such contention is merely the conclusion of Movants and there is no showing as to the basis upon which it is made. Even if true, under the Rules of this Court, it is not a proper ground for applying for leave to file an *amicus curiae* brief (Rule 42(3)).

Moreover, an examination of the complaint in *Baker v. Gulf Oil Co., supra,* reveals that not only are the issues of law unlike the instant case, but even if the allegations of the complaint are proved, there is no factual similarity between that case and the instant case.

Conclusion.

To require this Court to consider, in addition to the petition for writ of certiorari, an *amicus curiae* brief duplicating in substance the same principles and arguments would be unduly burdensome to the Court and counsel in this case.

For each and all of the foregoing reasons, we respectfully urge that the motion of Movants for leave to file a brief as *amicus curiae* in support of the petition for writ of certiorari in the above-entitled action be denied.

Respectfully submitted,

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